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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-359

U. S. INDUSTRIES, INC. and DIVERSACON INDUSTRIES, INC.,

Petitioners,

v.

F. BROWNE GREGG,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners,

v.

F. BROWNE GREGG,

Respondent.

———

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this action on July 19, 1976. That judgment reversed a default judgment based upon *quasi-in-rem* jurisdiction in favor of the petitioner Diversacon Industries, Inc. which had been granted by the United States District Court for the District of Delaware and ordered that the action be dismissed for want of jurisdiction over respondent, even though no such jurisdiction had ever been claimed.

The decision of the Court of Appeals conflicts directly with a decision dated April 15, 1976 of the Supreme Court of Delaware in *The Greyhound Corporation et al. v. Heitner,* Action No. 132, 1975, from which an appeal to this Court is presently pending *sub nom. Shaffer et al., appellants v. Heitner, appellee,* Appeal No. 75-1812. Should this Court conclude that review is warranted, consolidation of this case with Appeal No. 75-1812 may appear appropriate.

CITATIONS TO OPINIONS BELOW.

The United States District Court for the District of Delaware rendered three opinions relevant to the issues raised by this petition. The first, dated September 28, 1972 and reported at 348 F. Supp. 1004, is printed as Appendix B. The second, dated February 2, 1973 and reported at 58 F. R. D. 469, is printed as Appendix C. The third, an unreported Memorandum Opinion and Order dated April 24, 1975, is printed as Appendix D. The opinion of the United States Court of Appeals for the Third Circuit, dated July 19, 1976 and not yet officially reported, is printed as Appendix E. The opinion of the Delaware Supreme Court in *The Greyhound Corporation v. Heitner* (not yet officially reported) No. 132, 1975 (April 15, 1976) with which the decision of the Court of Appeals herein directly conflicts is printed as Appendix F.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on July 19, 1976.

The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

STATUTES AND RULES INVOLVED.

Statutes involved in this appeal include § 8-317(1) of Title 6, Delaware Code, Sections 169 and 324 of Title 8, Delaware Code, and § 366 of Title 10 Delaware Code. Court Rules involved are Rule 4(db) of the Delaware Court of Chancery and Rule 4(e) of the Federal Rules of Civil Procedure. These statutes and rules are set out in Appendix A.

QUESTION PRESENTED.

Has the power of state courts to exercise *quasi-in-rem* jurisdiction over non-residents by seizure of their property or control over their debtors, as recognized in *Pennoyer v. Neff*, 95 U. S. 714 (1877)—or to exercise *in personam* jurisdiction by personal service of process as recognized in *Fauntleroy v. Lum*, 210 U. S. 230 (1908) —been limited or replaced by requirements of "minimal contacts", as applied to "long-arm", *in personam* jurisdiction over foreign corporations in *International Shoe Co. v. Washington*, 326 U. S. 310 (1945)?

STATEMENT OF THE CASE.

Review is sought of the reversal of a default judgment entered when the defendant elected not to answer after his challenges to the *quasi-in-rem* jurisdiction of the district court had been rejected. The amount of the judgment was the net value of the defendant's property in Delaware realized upon its sale pursuant to an order of foreign attachment. The basis for reversal was the circuit court's conclusion that, notwithstanding that defendant's property had been lawfully attached, other sufficient "minimal contacts" affiliating the suit to the forum were lacking. **The decision represents an unprecedented engrafting of principles enunciated in *International Shoe Co. v. Washington, 326 U. S. 310 (1945)*, with respect to the presence of a defendant within a jurisdiction for purposes of *in personam* jurisdiction, upon foreign attachment and *quasi-in-rem* jurisdiction, as upheld in *Pennoyer v. Neff, 95 U. S. 714 (1877)*.**

This action was commenced in the Court of Chancery in and for New Castle County, Delaware, on June 19, 1972,

by plaintiffs U. S. Industries, Inc. ("USI"), a Delaware corporation, and its wholly owned subsidiary, Diversacon Industries, Inc., a Florida corporation, against F. Browne Gregg, who had in 1969 sold Diversacon to USI. As consideration for its purchase, USI had issued to Gregg 100,962 shares of its common stock and 8750 shares of Special Preference Stock (Series M) and given Gregg a four-year employment contract. As part of the transaction Gregg, among other things, gave to Diversacon a note for $500,000, payable in five equal annual installments.

The complaint stated eight claims. Four claims alleged that Gregg had made false representations to USI concerning the financial condition of his corporation constituting common law fraud, violations of federal securities law, and breaches of contract. Three claims dealt with breaches by Gregg of his employment contract. The final claim alleged that Gregg had defaulted on the second installment of the $500,000 promissory note.

Jurisdiction over Gregg, a resident of Florida, was sought by attachment of his property pursuant to 10 *Del. C.* § 366 (A4) and procedures set out in Chancery Court Rule 4(db) (A5-A7), a process denominated "sequestration" in Delaware. With the filing of the complaint plaintiffs moved to provide for notice to Gregg of the suit by certified mail and publication, and to exercise control over his property, identified by affidavit as 68,210 shares of common stock and 8750 shares of Special Preference Stock of USI, the shares still held by Gregg from the 1969 transaction. This intangible property had a *situs* in Delaware by virtue of 8 *Del. C.* § 169 (A1), and was subject to judicial control there by virtue of the court's control over the Delaware domiciliary, USI, which controlled the record transfer of its shares.

The Court of Chancery on June 19, 1972 issued an Order of Sequestration which appointed a sequestrator to "seize" the shares of stock identified in the affidavit. Pursuant to the Order, the sequestrator notified USI not to recognize any attempt to transfer the shares except in accordance with the Order. The Order was duly published and a copy together with the summons and complaint sent to Gregg by certified mail. The Order in substance advised Gregg that should he default the "seized" property could be sold in satisfaction of any judgment to which plaintiffs might be entitled. The Order of Sequestration thus constituted a classic foreign attachment invoking *quasi-in-rem* jurisdiction.

The Order required Gregg to appear and plead to the complaint by July 31, 1972. On July 25, the First National Bank of Leesburg, Florida (hereinafter "Intervenor Bank") moved to intervene and quash, averring that, by reason of prior pledges by Gregg to it of all of the sequestered shares as security for loans totalling $1,635,000, it owned the whole of the interests in the shares and, hence, nothing owned by Gregg had been sequestered. On July 28, Gregg removed the case to the United States District Court for the District of Delaware, alleging diversity of citizenship, and on August 4, he too moved to quash the sequestration. He joined with the Intervenor Bank in claiming that nothing of his had been seized. Secondly, he claimed that the sequestration was unconstitutional.

Gregg's constitutional challenge was twofold. First, under principles established by *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), he assertedly lacked sufficient "minimal contacts" with Delaware to permit its courts to claim jurisdiction over him. Second, under *Fuentes v. Shevin*, 407 U. S. 67 (1972), the sequestration constituted an impermissible seizure without prior notice or opportunity to be heard.

On September 28, 1972, U. S. District Judge Walter K. Stapleton issued an opinion (Appendix B) in which he

held that, notwithstanding the prior pledges, defendant Gregg owned an equity in the USI shares which had been validly attached,[1] and that the sequestration statute and procedure were constitutional. His reasoning was, firstly, that *International Shoe Co. v. Washington, supra,* was not applicable to *quasi-in-rem* proceedings and, secondly, that *Fuentes v. Shevin, supra,* had expressly exempted from its strictures attachments to obtain jurisdiction.

Thereupon, Gregg filed a further jurisdictional challenge claiming the right to defend fully on the merits while limiting a prospective judgment to the value of his interest in the seized property. On February 2, 1973, after briefing and argument, Judge Stapleton denied this motion for limited appearance. His opinion (Appendix C) held that Delaware law, which requires a defendant to enter a general appearance as a condition of defending on the merits in a *quasi-in-rem* case, to be both applicable and constitutional.

Gregg filed both a Notice of Appeal and Petition for Special Writ to the Third Circuit Court of Appeals. On February 28, 1973, that Court denied the petition and dismissed the appeal for want of jurisdiction, without prejudice to Gregg's right to appeal from a final order.

March 1, 1973 was finally the date for Gregg to answer. Upon his failure to do so, plaintiffs on March 6 directed the entry of his default in accordance with F. R. C. P. 55(a). Simultaneously they moved the Court to take the several steps necessary to reduce Gregg's de-

1. Since Gregg's Special Preference Stock was by its terms convertible into USI common stock at a ratio of 3.125 for one, Gregg's 8750 preference shares were equivalent to 27,344 common shares. Thus, with the 68,210 shares of common stock seized, 95,554 common stock equivalents were subject to the Order of Sequestration. At $23 per share, the bid price at the date of seizure, the total market value was approximately $2.2 million, $565,000 in excess of the Bank's $1,635,000 loan.

fault to judgment. On March 16, the District Judge directed the Intervenor Bank to record the status of its lien [2] and fixed a date for inquest.

On April 4, 1973, at inquest plaintiff Diversacon limited its proofs to establishing that Gregg had failed to pay the second installment of his $500,000 promissory note and that, as a consequence, it was entitled to a default judgment in the amount of $400,000 plus interest, costs and reasonable attorneys' fees. Under *quasi-in-rem* principles, however, the amount of the judgment was limited to the value of the sequestered shares, as fixed by sale.

On November 15, 1973, the District Judge ordered the sale of Gregg's stock. He directed that, first, the remaining common shares be sold on the New York Stock Exchange and the proceeds applied to reduce the Bank's lien. This was done November 16, reducing the lien to $44,406.84. The Order further directed public sale of the 2000 Special Preference shares, subject to the Intervenor Bank's lien as it would then exist. However, the sale did not then occur. On December 13, 1973, Gregg filed a notice of appeal and moved for a stay of sale. Before this motion was heard, the Bank sold privately 800 shares for $44,800, discharging in full its lien and generating a small excess ($123.44) which was deposited with the sequestrator. Thereafter, by mutual consent, sale of the remaining 1200 shares of

2. Judge Stapleton had provided the Intervenor Bank with a non-judicial procedure for protecting its senior interest. The Bank was authorized to sell shares if sale was permitted by its loan agreements with Gregg. The only obligations imposed were to report any sales and to apply the proceeds to reduce the loans.

Commencing in October, 1972, the market price of USI shares began a steady decline. Because of this, the Bank undertook a series of sales so that by March, 1973, the number of shares held subject to the Order of Sequestration had been reduced to 7547 shares of common stock and 2000 shares of Special Preference Stock, and the amount of the Bank's lien had been reduced from the original $1,635,000 to $102,499.21 plus interest.

Special Preference Stock was stayed until disposition of Gregg's appeal. On May 30, 1974 Gregg's appeal was again dismissed as premature.

After remand, Gregg twice moved to vacate his default and quash the sequestration. Both motions were denied. With the second denial, entered April 24, 1975, Judge Stapleton issued a Memorandum Opinion dealing with the new authorities which Gregg had urged upon him (Appendix D).

On May 28, 1975, the District Judge entered a renewed order for sale of Gregg's stock. On June 25, 1975, the 1200 shares of Special Preference Stock were sold in competitive bidding for $20,000, making the total amount received from sale of the sequestered property $20,123.44. The sale was confirmed on July 7, 1975. Thereafter, plaintiff Diversacon moved for a default judgment. After allowing for costs totalling $1,642.24, the District Judge on August 20, 1975 directed entry of judgment for Diversacon in the amount of $18,481.20.

Gregg again appealed, renewing all of the substantive and procedural arguments he had made in the district court. While the case was awaiting argument, the Delaware Supreme Court, confronted with virtually the identical legal and constitutional arguments, on April 15, 1976 decided *The Greyhound Corporation v. Heitner* (Appendix F), in which it held that the Chancery Court sequestration procedure as applied to the attachment of shares of Delaware corporations owned by non-residents was constitutional in all respects. **The Delaware Supreme Court specifically ruled that the "minimal contacts" approach to long-arm *in personam* jurisdiction enunciated by this Court in *International Shoe Co.* was not applicable to *quasi-in-rem* jurisdiction invoked by foreign attachment.**

The Third Circuit opinion (Appendix E), dated July 19, 1976, per Circuit Judges Aldisert and Weis and Senior

Circuit Judge Kalodner, dealt with only two of Gregg's points. Firstly, it affirmed that Gregg had owned an attachable interest in the sequestered shares. Secondly, it held, contrary to the Supreme Court of Delaware and the district court, that foreign attachment and the exercise of *quasi-in-rem* jurisdiction were subject to the "minimal contacts" limitations of *International Shoe Co.* and that such minimal contacts were here lacking. Accordingly, judgment was reversed and dismissal ordered.

REASONS FOR GRANTING THE WRIT.

I. The Decision Below Irreconcilably Conflicts With a Contemporaneous Decision of the Supreme Court of Delaware.

The crux of the holding below is that control over property lawfully subject to state power is not of itself enough to base an assertion of judicial power over such property for purposes of *quasi-in-rem* jurisdiction. There must be some additional "minimal contacts" or "affiliating circumstances" between the suit and the forum for such assertion of jurisdiction to be constitutionally permissible. In reaching this view, the Circuit Court expressly rejected the opinion of the Delaware Supreme Court in *The Greyhound Corp. v. Heitner, supra* (Appendix F), which barely two months earlier had upheld the traditional rule that *quasi-in-rem* jurisdiction could be lawfully asserted by proper attachment of property subject to the control by the court.

The instant case thus presents a classic instance of a conflict between jurisdictions interpreting decisions of this Court—here, principally, *Pennoyer v. Neff*, 95 U. S. 714 (1877), *Ownbey v. Morgan*, 256 U. S. 94 (1921) and *International Shoe Co. v. Washington*, 326 U. S. 310 (1945). State courts are not bound by decisions of the federal courts of appeals. See *e.g., Evans Theater Corp. v. Slaton*, 180 S. E. 2d 712 (Ga. Sup.) cert. den. 404 U. S. 950 (1971); *Occhino v. Illinois Liquor Control Commission*, 329 N. E. 2d 353, 128 Ill. App. 3rd 967 (1975); *Rohr Aircraft Corp. v. County of San Diego*, 336 P. 2d 521 (Cal. Sup. 1959), rev'd on other grounds 362 U. S. 628 (1960), *Owsley v. Peyton*, 352 F. 2d 805 (4th Cir. 1965). Hence, the courts of Delaware will continue to apply the law as

declared by the Delaware Supreme Court. On the other hand, a plaintiff who seeks relief in the United States District Court or whose case is removed to that court from the state courts will be subject to different rules.

The problem is not peculiar to Delaware. Virtually every state has a foreign attachment statute, enabling plaintiffs to invoke *quasi-in-rem* jurisdiction by seizure of property within the jurisdiction. See *e.g. Carey v. Sugar*, — U. S. —, 47 L. Ed. 2d 587 (1976). Until the decision below, the presence of such property has been uniformly held of itself sufficient to permit invocation of such jurisdiction. The conflict engendered by this case and *Heitner* will inevitably spread to other jurisdictions. Assuming federal courts adopt the Third Circuit's approach, while state courts follow Delaware's, not only will the results conflict, but also Rule 4(e) of the Federal Rules of Civil Procedure (A7-8), which promotes conformity between state and federal attachment procedures, will have been nullified.

Moreover, in placing the limitations of "minimal contacts" upon constitutional invocation of foreign attachment, the court below raises numerous constitutional and practical questions. What constitutes a "minimal contact" or "affiliating circumstance"? Does the presence of a resident plaintiff meet the test?[3] Does ownership of realty, tangible personalty, or intangible personalty other than stock within the jurisdiction qualify? If Gregg's stock certificates had been physically seized, would "minimal contacts" have been met?[4] Is the rule different in a case

3. The court below distinguished an earlier unreported case, *Baker v. Gotz*, affirmed en banc 492 F. 2d 1238 (3rd Cir. 1974), in which a panel of the Third Circuit initially upheld a sequestration under the Delaware procedure, by noting that, in the earlier case, the plaintiff railroad had substantial assets in Delaware (See Footnote 10 at A88).

4. While the court below devoted many pages to questioning the precedents under which Delaware has declared the shares of

purely *in rem*, where title to the property itself is to be adjudicated? Lastly, is the presence of defendant's debtor not enough and, if not, has not classic garnishment been abolished? Until the decision below, the answers to these questions were settled; now they are in doubt.

The decision below thus puts at sea concepts utilized unquestioningly for centuries in the day-to-day administration of justice. We respectfully urge that this Court accept review in order to restore some balance and conformity to the law of foreign attachment.

II. The Decision Below Irreconcilably Conflicts With Decisions of Other Federal Courts.

Although the court below purported to distinguish it, the decision below is in irreconcilable conflict with the decision of the Second Circuit Court of Appeals in *Minichiello v. Rosenberg*, 410 F. 2d 106 (2d Cir. 1968) cert. den. 396 U. S. 844 (1969). In *Minichiello*, the court held that the most tenuous of property subject to the writ of a court—*i.e.*, ownership of a liability insurance policy issued by an insurance company qualified to do business in New York and thereby subject to control by its courts—was sufficient as a constitutional matter to permit those courts to exercise *quasi-in-rem* jurisdiction by foreign attachment over the non-resident policyholder to the extent of the policy's value. The instant case holds that ownership of stock in a Delaware corporation, the transfer of

4. (Cont'd.)
its corporations to have a *situs* in Delaware (*Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1 (1900) and *Rogers v. Guaranty Trust Company*, 288 U. S. 123 (1932)), the court did not invalidate those holdings. Nonethless, the attention devoted by the court to the particular property here involved—corporate shares—leaves open the questions of whether it would apply a different rule to other types of intangibles and, if so, why.

which is controlled by a corporation which is subject to the writ of the Delaware courts, is not of itself sufficient as a constitutional matter to permit the Delaware courts to exercise such jurisdiction over the non-resident stockholder to the extent of the stock's value.[5]

The purported basis for distinguishing *Minichiello* is that in New York attachment of liability insurance is limited to resident plaintiffs (A89). This distinction cannot withstand analysis. First, it is not clear that the New York law is so limited. The case generally cited to support that view, *Farrell v. Piedmont Aviation, Inc.*, 411 F. 2d 812 (2d Cir. 1969), does not so hold. In *Farrell* the plaintiff in fact was a New York administrator. More importantly, whatever the rationale for its conclusion, *Farrell* did not impose *International Shoe Co.* concepts of "minimal contacts" upon use of foreign attachment; *International Shoe Co.* is not even cited in the opinion.

But even if *Minichiello* be read as validating foreign attachment only where invoked by a domiciliary, still *Minichiello* cannot be reconciled. One of the plaintiffs herein, USI, is a Delaware domiciliary, albeit a corporate one. Denying corporate citizens remedies available to individuals is impermissible. See, *e.g.*, *Connecticut General Life Ins. Co. v. Johnson*, 303 U. S. 77 (1938); *Louis K. Liggett Co. v. Lee*, 288 U. S. 517 (1933); *Grosjean v. American Press Co.*, 297 U. S. 233 (1936). Moreover, Judge John J. Gibbons' concurring opinion in *Jonnet v. Dollar Savings Bank*, 530 F. 2d 1123, 1130 (3rd Cir. 1976),

5. There is a difference between the Delaware practice and the practice approved in *Minichiello* with respect to the limits of liability if the defendant appears. Delaware requires a general appearance; the rule approved in *Minichiello* does not. However, this distinction raises questions not considered below which are not related to the constitutionality of the basic exercise of *quasi-in-rem* jurisdiction.

adopted by the court below, involved Pennsylvania plaintiffs and is, on that basis, indistinguishable from *Minichiello.*

The purported distinction which the court below saw in *Minichiello,* moreover, raises serious questions about the extent to which states or state courts can constitutionally limit the access of non-resident plaintiffs to their courts unless done on a case-by-case *forum non conveniens* basis. See, *e.g., Watkins v. Conway,* 358 U. S. 188 (1958); *Hughes v. Fetter,* 341 U. S. 609 (1951).

Hence, the decision below conflicts squarely with *Minichiello* on the constitutional extent of *quasi-in-rem* jurisdiction. Other federal courts faced with the two conflicting lines of authority could well reach inconsistent results. Hence, Supreme Court Rule 19(b) seems directly applicable, and this Court should grant review.

III. The Opinion Below Disregards the Controlling Precedents of This Court.

In *Lebowitz v. Forbes Financing & Leasing Corporation,* 456 F. 2d 979 (1972), the Third Circuit invited this Court's review of *quasi-in-rem* jurisdiction. There it upheld the continuing validity of foreign attachment for *quasi-in-rem* jurisdiction, stating with respect to *Ownbey v. Morgan,* 256 U. S. 94 (1921) and *McKay v. McInnes,* 279 U. S. 820 (1929), cases which supported its conclusion: *"Any reexamination of the continuing vitality of these cases must come from the Supreme Court"* (456 F. 2d at 982) (emphasis added). In a concurring opinion, Circuit Judge John J. Gibbons expressed doubts concerning the continuing constitutionality of foreign attachment and *quasi-in-rem* jurisdiction. He noted that the cases upholding such jurisdiction had preceded *International Shoe Co.,* and he suggested some re-evaluation was warranted

(*Ibid*). Nonetheless, he too felt himself "bound by the [governing] precedents" (456 F. 2d at 983) and joined with the majority in upholding the attachment there involved.

This Court twice declined to review *Lebowitz* (409 U. S. 843 and 409 U. S. 1049 (1972)). Upon three subsequent occasions—*Fuentes v. Shevin,* 407 U. S. 67 (1972); *Mitchell v. W. T. Grant Company,* 416 U. S. 600 (1974); and *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U. S. 633 (1974)—this Court cited *Ownbey v. Morgan* with apparent approval, as upholding the continuing validity of foreign attachment and *quasi-in-rem* jurisdiction. In no case were the concepts even remotely questioned.[6] Nonetheless, thereafter, Circuit Judge Gibbons, in a concurring opinion in *Jonnet v. Dollar Savings Bank,* 530 F. 2d 1123, 1130 (3rd Cir. 1976), said that *International Shoe Co.* had indeed overruled *Ownbey v. Morgan* and, with it, the earlier landmark decisions of *Pennoyer v. Neff,* 95 U. S. 714 (1877) and *Harris v. Balk,* 198 U. S. 215 (1905). He concluded that foreign attachment and *quasi-in-rem* jurisdiction were unconstitutional.

Subsequent to *Jonnet, supra,* this Court again considered the subject of foreign attachment. In *Sugar v. Carey, supra,* it reversed a Second Circuit opinion which had invalidated on procedural grounds New York's foreign attachment law, describing that remedy as "one undoubtedly of importance to the state" (47 L. Ed. 2d at 591).

Nonetheless, disregarding virtually without comment these plain indications of this Court's view of the continuing efficacy of foreign attachment, the court below ex-

6. There was, of course, controversy over the procedures for invoking such jurisdiction. Compare *Mitchell v. W. T. Grant Company, supra,* with *North Georgia Finishing Inc. v. Di-Chem, Inc.,* 419 U. S. 601 (1975).

pressly adopted Judge Gibbons' concurring opinion in *Jonnet* as its own, stating that Judge Gibbons had "develop[ed] a thesis to which we perceive no effective rebuttal" (A87).

The thrust of every pronouncement by this Court before and since *International Shoe Co.* has been to recognize the continuing vitality of foreign attachment and *quasi-in-rem* jurisdiction. Neither *International Shoe Co.*, itself nor any other decision of this Court even remotely suggests *International Shoe Co.*, was intended in any way to limit such jurisdiction.[7] Yet, the Third Circuit has slipped in five years from respectful adherence to the expressed views of this Court to utter disregard of them. Proper administration of justice requires that this Court put matters straight.

IV. The Decision Below Represents a Novel Expansion in an Important Area Which Requires the Definitive Attention of This Court.

Under our federal system, an important concern has historically been, and continues to be, the proper constitutional limitations upon exercise of jurisdiction by state courts. *Pennoyer v. Neff*, 95 U. S. 714 (1878); *Harris v. Balk*, 198 U. S. 215 (1905); *Fauntleroy v. Lum*, 210 U. S. 230 (1908); *Ownbey v. Morgan*, 256 U. S. 94 (1921); *International Shoe Co. v. Washington*, 326 U. S. 310 (1945); *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957) and *Hanson v. Denckla*, 357 U. S. 235 (1958) are landmark decisions. Each deals with one or more facets of what has heretofore been recognized as three separate aspects of such jurisdiction: *in personam*, *in rem*, and *quasi-in-rem*.

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7. *International Shoe Co.* itself cites *Pennoyer v. Neff, supra,* with approval—hardly an indication that the latter was being overruled.

The decision below forges a new rule expressly limiting *quasi-in-rem* jurisdiction; its implications, as a matter of logical extension, read equally upon *in personam* and *in rem* bases of state court jurisdiction and, in effect, develop a new rationale and test for all assertions of jurisdiction. The court below obliterated with a broad brush historical distinctions among the different kinds of jurisdiction which have been recognized for centuries. Wholly new principles which demand careful scrutiny by this Court were written.

The court below reached its novel conclusion by misapplying three decisions of this Court. *International Shoe Co.*, *Hanson v. Denckla*, 357 U. S. 235 (1958) and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950). Regarding these opinions, the court below states as follows:

> "We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label—*in rem*, *quasi in rem*, or *in personam*—that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts, we must assume that ultimately the test of *International Shoe* is determinative: that there be sufficient connection with the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' 326 U. S. at 316." (A86)

These authorities, individually or read together, do not support the conclusion asserted.

Contrary to the court below, the "minimal contacts" test of *International Shoe Co.* is *not* a test of the contacts of a *case* to the forum. It is a test of presence of a corporate defendant within a jurisdiction for *in personam* pur-

poses. *International Shoe Co.* does not establish limits upon where transitory causes of action may be maintained; it deals only with where defendants can be sued by use of long-arm procedures. See *Perkins v. Benguet Consolidated Mining Co.*, 342 U. S. 437 (1952).

Secondly, the "affiliating circumstances" test of *Hanson v. Denckla* is whether there is a sufficient "affinity" between a forum and an intangible *res* to support the forum's assertion of *in rem* jurisdiction over such *res*. It is *not* a test of the "affinity" of a suit to the forum. In essence, it is a test of what intangibles can be lawfully attached.

In the present case, the "affiliating circumstances" test is whether the relationship of shares of Delaware corporations to Delaware is sufficient to support a Delaware court's claim of *in rem* jurisdiction over them. We submit that it plainly is. See *Jellenik v. Huron Copper Mining Co., supra, Rogers v. Guaranty Trust, supra.* In all events it is a question which the court below did not address. Moreover, the statement (Footnote 8, A86) that *Hanson v. Denckla* used "minimum contacts" and "affiliating circumstances" interchangeably is, bluntly, incorrect. This Court carefully used each phrase to delineate two separate subjects of inquiry.

Mullane is equally misused by the court below. It holds that a state court is not precluded from entertaining an essentially *in rem* proceeding involving a domestic trustee merely because in some aspects it may grant *in personam* relief. It is an expansion of, not a limitation upon, state court jurisdiction. It does not hold that the same constitutional test is applicable to the bringing of *in personam, in rem* and *quasi-in-rem* suits.

In *McGee v. International Life Insurance Co.*, 355 U. S. 220 (1957), this Court reviewed the authorities leading up to *International Shoe Co.* and discerned "a trend . . . toward expanding the permissible scope of state

jurisdiction over foreign corporations and other non-residents" (355 U. S. at 222). The decision below represents a plain repudiation of this trend. By redefining "minimal contacts" to test something beyond the presence of a defendant in the jurisdiction, and "affiliating circumstances" to test something other than the presence of an intangible *res* within the jurisdiction, it has created constitutional impediments to jurisdiction where none had heretofore been discerned.

The court below reached its conclusion largely *ipse dixit*. Not only does it develop its own thesis by misconstruction of the authorities relied upon, it gives back-of-the-hand treatment to the contrary views of the district court and the Supreme Court of Delaware, labelling them "cryptic" (A77) and "truncated" (A84). However, nowhere does the court below come to grips with their reasoning. For example, the District Judge developed a significant parallel between the constitutional reach of a state court over a non-resident defendant personally served and a non-resident defendant whose property is attached (A75-76). The District Judge also saw in the doctrine of *forum non conveniens* a utilitarian, *non-constitutional* method by which courts might deal with the potential of abuse which the circuit court perceived. The opinion is silent on both of these subjects.

If the law of *quasi-in-rem* jurisdiction is to be changed and *Pennoyer v. Neff, supra,* is to be discarded after a century of heretofore uniform acceptability and prior centuries of usage, it is a change to be imposed by this Court after full consideration of all arguments. Petitioners submit that such consideration must inevitably lead to its reaffirmation. In all events, the subject is important enough in its broad implications to warrant such consideration, which, plainly, the court below failed to give it.

CONCLUSION.

For reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX A.

Statutes and Rules Involved.

6 Del. C. § 8-317. *Effect on attachment and sequestration laws; attachment or levy upon security.*

(1) Nothing contained in this subtitle shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling.

8 Del. C. § 169. *Situs of ownership of stock.*

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State.

8 Del. C. § 324. *Attachment of shares of stock or any option, right or interest therein; procedure; sale; title upon sale; proceeds.*

(a) The shares of any person in any corporation with all the rights thereto belonging, or any person's option to acquire the shares, or his right or interest in the shares, may be attached for debt, or other demands. So many of the shares, or so much of the option, right or interest therein

may be sold at public sale to the highest bidder, as shall be sufficient to satisfy the debt, or other demand, interest and costs, upon an order issued therefor by the court from which the attachment process issued, and after such notice as is required for sales upon execution process. If the debtor lives out of the county, a copy of the order shall be sent by registered or certified mail, return receipt requested, to his last known address, and shall also be published in a newspaper published in the county of his last known residence, if there be any, 10 days before the sale; and if the debtor be a nonresident of this State shall be mailed as aforesaid and published at least twice for 2 successive weeks, the last publication to be at least 10 days before the sale, in a newspaper published in the county where the attachment process issued.

(b) When shares of stock, or any option to acquire such or any right or interest in such, shall be so attached, a certified copy of the process shall be left in this State with any officer or director, or with the registered agent of the corporation. Within 20 days after service of the process, the corporation shall serve upon the plaintiff a certificate of the number of shares held or owned by the debtor in the corporation, with the number or other marks distinguishing the same, or in the case the debtor appears on the books of the corporation to have an option to acquire shares of stock or any right or interest in any shares of stock of the corporation, there shall be served upon the plaintiff within 20 days after service of the process a certificate setting forth any such option, right or interest in the shares of the corporation in the language and form in which the option, right or interest appears on the books of the corporation, anything in the certificate of incorporation or bylaws of the corporation to the contrary notwithstanding. Service upon a corporate registered

agent may be made in the manner provided in § 321 of this title.

(c) If the shares of stock or any of them or the option to acquire shares or any such right or interest in shares, or any part of them, be sold as provided in subsection (a) of this section, any assignment, or transfer thereof, by the debtor, after attachment so laid, shall be void. If, after sale made and confirmed, a certified copy of the order of sale and return be left with any officer or director or with the registered agent of the corporation, the purchaser shall be thereby entitled to the shares or any option to acquire shares or any right or interest in shares so purchased, and all income, or dividends which may have been declared, or become payable thereon since the attachment laid. Such sale, returned and confirmed, shall transfer the shares or the option to acquire shares or any right or interest in shares sold to the purchaser, as fully as if the debtor, or defendant, had transferred the same to him according to the certificate of incorporation or bylaws of the corporation, anything in the certificate of incorporation or bylaws to the contrary notwithstanding. No order of sale shall be issued until after final judgment shall have been rendered in any case. The court which issued the levy and confirmed the sale shall have the power to make an order compelling the corporation, the shares of which were sold, to issue new certificates to the purchaser at the sale and to cancel the registration of the shares attached on the books of the corporation upon the giving of an open end bond by such purchaser adequate to protect such corporation.

(d) The money arising from the sale of the shares or from the sale of the option or right or interest shall be applied and paid, by the public official receiving the same, as by law is directed as to the sale of personal property in cases of attachment.

10 Del. C. § 366. *Compelling appearance of nonresident defendant.*

(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del.

DELAWARE CHANCERY COURT RULE 4

(db) *Service by Publication and Seizure.*

(1) No order shall be entered under 10 Del. C. § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a nonresident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

(a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

(2) Within 3 business days after the filing of such bond or bonds as may be required or within such other time as the Court may fix, the Register shall, in addition to making the required publication, send by registered or certified mail to each defendant whose appearance is sought to be compelled a certified copy of the order and a copy of the pleading asserting the claim.

(3) After the filing of such bond or bonds as may be required by the order, but not later than 10 days after the date of the order of seizure, the sequestrator shall serve a certified copy of the order upon the person, persons or corporation having possession or custody of the property or control of its transfer, and shall seize the property. The sequestrator shall seize property which is, or appears, not to be susceptible of physical seizure within the State by serving a direction in writing that the person, persons or corporation having possession or custody of the property or control of its transfer, shall:

(a) Retain the property and recognize no transfer thereof until further notice from the sequestrator or order of the Court;

(b) Forthwith make a notation upon any records pertaining to the property that such property is held pursuant to the order of the Court; and

(c) Within 10 days after the date of such service, deliver a certificate under oath to the sequestrator, specifying (i) such defendant's property, if any, of which it has possession, custody or control or control of its transfer; (ii) whether the title or interest of each such defendant is legal or beneficial; and (iii) if legal, the name and address of the holder of any equitable title or interest therein, if known, and, if beneficial, the name and address of the holder of the legal title thereto, if known.

(4) Within 20 days after seizure, unless otherwise specially ordered, the sequestrator shall make his return to the Court, therein setting out all proceedings hereunder to the date of said return, including the date and hour of service and seizure pursuant to subdivision (3) hereof.

(5) The Court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this Rule in any cause upon application to it stating the reasons therefor.

FEDERAL CIVIL RULE 4(e)

Summons: *Service Upon Party Not Inhabitant of or Found Within State.* Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in

lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

APPENDIX B.

U. S. INDUSTRIES, A CORPORATION AND DIVERSACON INDUSTRIES, INC., A CORPORATION,

Plaintiffs,

v.

F. BROWNE GREGG,

Defendant.

Civ. A. No. 4431.

United States District Court,
D. Delaware.

Sept. 28, 1972.

David A. Drexler, Morris, Nichols, Arsht & Tunnell, Wilmington, Del., and Olwine, Connelly, Chase, O'Donnell & Weyher, New York City, for plaintiffs.

Thomas S. Lodge, and John R. Bowman, Connolly, Bove & Lodge, Wilmington, Del., and Bedell, Bedell, Dittmar, Smith & Zehmer, Jacksonville, Fla., for defendant.

H. James Conaway, Jr., and Ben T. Castle, Young, Conaway, Stargatt & Taylor, Wilmington, Del., for intervenor, First National Bank of Leesburg.

Opinion.

STAPLETON, *District Judge.*

U. S. Industries, Inc., a Delaware corporation having its principal place of business in New York ("USI"), and Diversacon Industries, Inc., a Florida corporation having its principal place of business in Florida ("Diversacon"), in-

stituted this action in the Court of Chancery of the State of Delaware against F. Browne Gregg, a citizen of the State of Florida. In the latter part of 1969 USI and Gregg entered into an Agreement and Plan of Reorganization (the "Agreement"). In this Agreement USI committed itself to purchase from Gregg all of the issued and outstanding shares of capital stock of certain corporations controlled by Gregg (the "Gregg corporations") in exchange for shares of USI voting common and special preference stock. The Agreement also provided for the execution of an employment contract under which Gregg would commit himself to USI to serve as an executive of the Gregg corporations. Such a contract was entered into at the closing of the transaction on October 20, 1969. Subsequent to that closing and as contemplated by the Agreement, the businesses formerly conducted by the Gregg corporations were transferred to the plaintiff Diversacon, a wholly owned subsidiary of USI.

The complaint is divided into eight counts. Those counts set forth the following claims:

1. A common law deceit claim by USI against Gregg based on allegations that Gregg made representations of material facts which were false and misleading and omitted to state material facts necessary in order to make the statements made not misleading in order to induce USI to enter the Agreement.

2. A claim by USI against Gregg under Section 17(a) of the Securities Act of 1933 based on the same factual allegations stated in Count 1 plus the allegation that instrumentalities of interstate commerce were utilized by Gregg.

3. A common law breach of warranty claim by USI against Gregg based upon the same factual allegations contained in Count 1.

4. A claim by USI against Gregg for the impressment of constructive trust upon Gregg's USI stock based upon the foregoing factual allegations and an additional allegation that Gregg intends to sell, transfer or otherwise dispose of or encumber said stock and that this would irreparably damage USI by rendering judgment ineffectual.

5. A common law rescission claim by USI against Gregg based on the foregoing factual allegations and the assertion that USI was fraudulently induced to employ Gregg pursuant to the employment agreement.

6(a). A breach of contract claim by USI against Gregg based on an allegation that Gregg breached his commitment to devote his full business time and best efforts to the business of the Gregg corporations or any successor entity "by mismanaging Diversacon, as by, among other things, undertaking contracts on the basis of estimates of the corporation's ability to complete them which he knew or should have known to be erroneous, thereby committing the corporation to contracts on terms it could not meet."

(b). A breach of fiduciary duty claim by Diversacon against Gregg based on an allegation that the same "mismanagement" constituted a breach of duty owed by Gregg as an employee of Diversacon.

7. A breach of contract claim by USI against Gregg based on an allegation that Gregg breached a covenant not to compete "in that, while in the employ of USI, Gregg bid successfully against USI for the acquisition of Can Concrete Rock Co., Inc., a Florida corporation, with actual or constructive knowledge of USI's bid."

8. A breach of contract claim by Diversacon against Gregg based on an allegation that Gregg has failed to pay Diversacon on a $500,000 note executed by Gregg in favor of the Gregg corporations, executed on October 20, 1969.

The complaint asks the following relief:

(a) Claims 1, 2 and 3—$20,000,000,

(b) Claim 4—the impressment of a trust,

(c) Claim 5—return of the compensation paid Gregg,

(d) Claims 6 and 7—unspecified compensatory damages, and

(e) Claim 8—$400,000 plus interest.

After filing its complaint, USI secured an order of the Court of Chancery purporting to sequester all shares of common and preferred stock of USI "owned, of record or beneficially, by said defendant." The sequestrator was authorized "to seize and hold said property and any right, title or interest, legal or equitable, which" Gregg had therein.

The First National Bank of Leesburg, Leesburg, Florida, intervened in the Chancery action and moved to quash the order of sequestration on the ground that it held the "equitable ownership" of the stock as a result of a pledge thereof in December of 1971 as security for a loan. The motion to quash was argued before the Court of Chancery, but the case was removed by Gregg before any decision on that motion was handed down. Following removal, the bank renewed its motion to quash the sequestration [1] and plaintiffs moved to remand the case to the Court

1. Plaintiffs concede that the sequestration could not have seized any interest which Gregg did not possess at the time of sequestration in June of 1972 and that the bank's rights under its pledge agreement are senior. The Court has offered to amend the order of sequestration to permit the bank to exercise any of the rights given to it by the pledge agreement, including the right of sale subject to any right Gregg may have with respect to the proceeds exceeding the amount of the loan. The bank has thus far, however, asked for and received only an amendment to the order of sequestration permitting the transfer of the stock into the name of the bank on the records of the company as provided for in the pledge agreement.

of Chancery. Thereafter Gregg also moved to quash the sequestration and to dismiss this action.

These motions present four issues for resolution. First, is this case properly removable under § 1441 of Title 28 of the United States Code? Second, if so, does the specific non-removal provision of the Securities Act of 1933, 15 U. S. C. § 77a et seq., prevent removal? Third, is the sequestration order, upon which the state court's jurisdiction was predicated and from whence our jurisdiction derives, valid? And, finally, if this Court has jurisdiction should any of the claims asserted be remanded to the state court?

I. Removal Under § 1441.

In support of his removal, Gregg relies on § 1441(c) of Title 28 of the United States Code which provides:

> "Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

Plaintiffs, in support of remand, assert that there is no "separate and independent claim or cause of action" in their complaint, "which would be removable if sued upon alone." They assert both that the complaint states no claim or cause of action which is separate and independent of the others, and, in the alternative, that if there is a separate and independent claim or cause of action its removal is barred either by want of complete diversity between adverse parties or by Section 22 of the Securities Act of 1933, 15 U. S. C. § 77v(a), which provides in part:

". . . No case arising under this subchapter [the Securities Act of 1933] and brought in any State court of competent jurisdiction shall be removed to any court of the United States. . . ."

Plaintiffs' initial argument stresses that all claims in the complaint arise as a result of USI's acquisition of the Gregg corporations. Plaintiffs correctly assert that the diversity of legal theories supporting the various claims and the fact that each does not rest upon the identical factual allegations is not determinative.[2] Assuming, however, that all the claims here asserted do arise out of the same "interlocked series of transactions" as that phrase is used in the relevant legal standard, plaintiffs' analysis ignores another equally important element in that standard.

In American Fire & Casualty Co. v. Finn, 341 U. S. 6, 14, 71 S. Ct. 534, 540, 95 L. Ed. 702 (1951), the Supreme Court held that "where there is *a single wrong* to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action under § 1441(c)." It is clear from this statement, the *Finn* opinion as a whole, and the subsequent cases applying its rationale that related transactions and common questions of law or fact are not alone enough to weld claims together for the purpose of applying § 1441(c). The circumstances and character of the impact upon the plaintiff or plaintiffs are also crucial.[3] Elsewhere in its

2. American Fire & Casualty Co. v. Finn, 341 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951).

3. See analysis in Mayflower Industries v. Thor Corp., 184 F. 2d 537 (3rd Cir. 1950); Twentieth Century Fox Film Corporation v. Taylor, 239 F. Supp. 913 (S. D. N. Y. 1965); Pinto v. Maremont Corporation, 326 F. Supp. 165 (S. D. N. Y. 1971); Greenshields v. Warren Petroleum, 248 F. 2d 61 (10th Cir. 1957); Unanue v. Caribbean Canneries, Inc., 323 F. Supp. 63 (D. Del. 1971); 1A Moore, Federal Practice, ¶ 0.163[4-5], pp. 708, 712-713.

opinion the Supreme Court suggests that inquiry must be made of whether there was "a single wrongful invasion of a single primary right of the plaintiff"—"one actionable wrong" for which plaintiff "was entitled to but one recovery"—damage arising from "a single incident." 341 U. S. at 13, 16, 71 S. Ct. at 540. As will appear hereafter the second part of this test is important in the context of this case and precludes a finding that no claim asserted is separate and independent of the others.

I accept plaintiffs' argument that Claims 1 through 5 are not separate and independent. All of these claims allege facts occurring in connection with a single transaction and assert but a single invasion of a single right, i. e., USI's right to be free from deception in its business dealings with others. The alleged damage to USI resulted from a single incident, consummation of a fraudulently induced bargain. Korber v. Lehman, 221 F. Supp. 358 (S. D. N. Y. 1963).

While the matter is not quite so clear, I agree with plaintiffs that Claims 6(a) and (b) are not separate and independent of each other. There is a split among the commentators as to whether plaintiffs who do not rely upon a right held jointly can ever be said to assert claims that are not separate and independent. The cases show a greater willingness to find separate and independent claims in situations where multiple plaintiffs have claims against a defendant or defendants than in situations where a single plaintiff asserts several multiple claims against a defendant or defendants. However, where the facts alleged arise out of the same transaction and damage to the respective plaintiffs is similar in kind and arises from a single incident, nothing in the *Finn* rationale would appear to dictate a holding of separate and independent claims. While the claims of the respective plaintiffs may be "separate," they

are not "independent." Fugard v. Thierry, 265 F. Supp. 743 (N. D. Ill. 1967); Rosen v. Rozan, 179 F. Supp. 829 (D. C. Mont. 1960); Wright, Federal Courts, § 39, n. 18 (1972 Supp.); Note, 52 Columbia L. Rev. 101, 106-107 (1952).

While USI's Claim 6(b) is for breach of contract and Diversacon's 6(a) claim is for breach of fiduciary duty, both rest upon the same facts. Any injury to these plaintiffs would result from a single invasion of a same interest and would "come from a single incident." USI, as a sole stockholder of Diversacon, had an interest in the quality of the management of Diversacon which it sought to protect by contract. Any invasion of that interest would be a simultaneous invasion of an identical interest of Diversacon's. While USI might conceivably be entitled to some damage not recoverable by Diversacon, any damage would necessarily stem from injury to Diversacon and any damage for which Diversacon recovered would not be recoverable by USI.

Since the claims stated in Claims 1 through 5 are not removable by reason of Section 22(a) of the Securities Act [4] and the claims stated in Claims 6(a), 6(b), and 8 are not removable for want of either complete diversity or a federal claim, the crucial question becomes whether Claim 7 states a claim separate and independent of the other claims in the complaint. Plaintiffs argue that, at a minimum, Count 7 is not separate and independent of Claims 6(a) and (b). First, they suggest that Claim 7, fairly read, alleges an injury to USI through competition by Gregg with Diversacon, and that the interest allegedly invaded in that claim is the same as the common interest of USI and Diversacon allegedly invaded in Claim 6. Claim

4. *Cf.* Pate v. Standard Dredging Corp., 193 F. 2d 498 (5th Cir. 1952).

7 in plaintiffs' view is only a particularization of the "mismanagement of Diversacon, Inc." alleged in Claims 6(a) and (b). Accordingly, plaintiffs conclude that Claim 7 is not a separate and independent claim. I do not agree with this conclusion.

Assuming that competition with USI through appropriation of a corporate opportunity of Diversacon could fairly be said to come within the conclusory allegation of "mismanagement of Diversacon," [5] this does not answer the relevant question unless all claims against a single fiduciary for corporate mismanagement necessarily constitute non-separate, non-independent claims. I see no reason to so hold. Here as in other areas the question must be whether the facts relied upon by the pleader show separate and independent claims.

Claim 6 alleges that Gregg committed Diversacon to contracts which he knew or should have known would be non-profitable to the detriment of USI and Diversacon.[6] Claim 7, liberally construed in the context of the attachments to the complaint, alleges a claim that Gregg damaged USI by bidding for a company which competes with Diversacon.

I conclude that these are separate and independent claims. The only things which they have in common are that they arise in the context of relationships initially established in the USI acquisitions of the Gregg corporations,

5. This assumption, at the least, stretches the concept of mismanagement beyond its commonly accepted scope.

6. The general allegation that Gregg has been guilty of "mismanaging" Diversacon to the extent it does more than characterize the facts alleged in this claim, is no more than a conclusion which can and should be disregarded for present purposes. "The subject matter of the controversy is whatever the plaintiff in good faith declares it to be in his pleadings, not by conclusions of law but by well-pleaded allegations of fact." Edwards v. E. I. DuPont de Nemours & Co., 183 F. 2d 165, 168 (5th Cir. 1950).

and, that as to USI, they allegedly constitute breaches of the same employment contract. Except for this common background, the transactions from which these claims arise are neither similar in character nor otherwise related. The alleged injuries complained of in Claims 6 and 7 do not result from a single incident or invasion. Moreover, the impact on USI and Diversacon of the Diversacon contracts referred to in Claim 6 and the impact on them of the Concrete Rock acquisition referred to in Claim 7 appear wholly unrelated in time or character. USI could recover damages for either wrong without recovering damages for the other or could recover for both without creating any problem of duplication of damages.

In view of the otherwise distinct character of these claims, the question boils down to whether breach of contract claims based on the same contract are necessarily non-separate, non-independent claims for purposes of Section 1441(c). I have found no case which directly passes upon this question. A negative response is dictated, however, by those authorities recognizing that the existence of common questions of law or fact are not alone enough to preclude removal under that section.

The only remaining question is whether Claim 7 is separate and independent from Claims 1 through 5 and from Claim 8. I conclude that it is. As heretofore noted, the wrong to USI in Claims 1 through 5 flowed from the consummation of a fraudulently induced bargain. It is wholly unrelated to the wrong to USI flowing from the alleged breach of the covenant not to compete and the wrong to Diversacon flowing from the alleged default on the note. While it is perhaps true that USI could not recover on its fifth claim for rescission of the employment contract and on its seventh claim for breach of the covenant not to compete, this is because the claims are legally

inconsistent and not because a monetary recovery on one would compensate USI for the alleged injury arising from the other.[7]

II. Section 22(a) of the Securities Act.

The conclusion that Claim 7 is a separate and independent claim which because of diversity of citizenship would be removable if sued upon alone necessitates an examination of the relationship between § 1441(c) of Title 28 and Section 22 of the Securities Act of 1933. 15 U. S. C. § 77v.

Despite the separate and independent character of Claim 7, Claim 2, arising under the Securities Act, nevertheless remains in the case. It can be argued that Section 22(a) precludes the removal of any action containing a claim under the Securities Act and that such a construction of the relevant statutes comports with the general policy favoring strict construction of the removal provisions. 1A Moore, Federal Practice, ¶ 0.157 [1.3]. The question presented by this argument appears to be one of first impression although a few cases have considered similar questions arising under statutes similar to Section 22(a) in language and purpose.

Both the Jones Act, 46 U. S. C. § 688, and the Federal Employers' Liability Act, 45 U. S. C. §§ 51-56, sim-

7. Pinto v. Maremont Corporation, 326 F. Supp. 165 (S. D. N. Y. 1971) is the only case found which arguably supports a conclusion contrary to the one I here reach. That case does not go as far, in my judgment, as plaintiffs suggest. The nature of the misrepresentation in the *Pinto* case is not disclosed in the opinion. However, the court's observation that "recovery could not be had under both the Securities Act claim and the contract claims," together with its reliance at this point on Korber v. Lehman, 221 F. Supp. 358 (S. D. N. Y. 1963) leads me to believe the damage to the plaintiff on the misrepresentation claims and those on the contract claims was identical and recovery on either would compensate plaintiffs for the same injury.

ilarly prohibit removal of claims asserted thereunder. 28 U. S. C. § 1445(a). Since the 1948 revision of the Judicial Code and the expansive reading given to § 1441(c) by the Supreme Court in *Finn,* rarely has a court, faced with a possible conflict between § 1441(c) and the applicable nonremoval provision, found a "separate and independent" claim. The question is thus avoided in the overwhelming number of reported cases.[8] There are, however, a handful of vintage district court opinions which decide that the joinder of a state law cause of action with a F. E. L. A. claim makes the whole case removable in the presence of the requisite diversity. Strother v. Union Pac. R. Co., 220 F. 731 (W. D. Mo. 1915): Bedell v. Baltimore & O. R. Co., 245 F. 788 (Ohio 1917); Givens v. Wight, 247 F. 233 (N. D. Tex. 1918). The legal theory upon which the question is there resolved is that in joining removable claims to a statutorily nonremovable one the plaintiff "waived" his right to the forum of his choice. Other cases from the same period, however, refer to the statutory provisions restricting removability as "jurisdictional" and indicate that there are no circumstances under which a case falling thereunder could be removed. Mitchell v. Southern Ry. Co., 247 F. 819 (N. D. Ga. 1917); Jones v. Southern Ry., 236 F. 584 (N. D. Ga. 1916).

Only one modern case has squarely decided the question. In Emery v. Chicago, B. & Q. R. Co., 119 F. Supp. 654 (S. D. Iowa 1954) plaintiff pleaded a cause of action

8. See e. g., Pate v. Standard Dredging Corp., 193 F. 2d 498 (5th Cir. 1952) (an action for negligence under the Jones Act and for unseaworthiness under general maritime law did not state separate and independent claims and was thus non-removable under the Jones Act). *Accord,* Gutierrez v. Pacific Tankers, 81 F. Supp. 278 (S. D. Tex. 1948); Greene v. United Fruit Co., 85 F. Supp. 81 (S. D. N. Y. 1949); McKee v. Merritt-Chapman & Scott Corp., 144 F. Supp. 423 (N. D. Ill. 1956); Hall v. Illinois Cent. R. Co., 152 F. Supp. 549 (W. D. Ky. 1957).

based on the Federal Employers' Liability Act and joined with it several claims based on breach of contract. The court held that the claims were "separate and independent" and the entire case was removable under § 1441(c). The court there seemed to adopt the waiver rationale of the older cases cited above:

> ". . . It rested with (plaintiff) whether he should state a cause solely under the Act and therefor not removable, or unite it with causes of action which might be removed. When he adopted the latter course, defendant then became entitled to exercise the right of removal conferred upon it by the statutes as to the causes of action properly removable. . . ." *Id.* at 657.

The commentators have spoken to the problem with something less than unanimity. Professor Moore in speaking of the non-removal provision of the Jones Act has said:

> "Finally, there is one situation where a literal application of the removal statute would effect the removal of a Jones Act claim. Under the provisions of § 1441(c) where there is a removable separate and independent claim joined with the nonremovable Jones Act claim, the entire suit can be removed . . ." (citing *Emery*) 1A Moore, Federal Practice ¶ 0.167 [3.2]

Professor Cohen has taken a different view:

> "Thus, it is possible, in a case where two parties are of diverse citizenship to encounter the joinder of an unremovable claim with a totally disconnected claim which would otherwise be removable. Assuming that the nonremovable claim is sufficiently substantial to pass muster under the fraudulent joinder rules, the

combined force of the policies generally precluding removal of the unremovable claim and those permitting joinder argue for leaving the entire litigation in the state court." Cohen, Problems in the Removal of a "Separate and Independent Claim or Cause of Action," 46 Minn. L. Rev. 1 (1961).

I find the waiver rationale of the *Emery* case unpersuasive.[9] It assumes its own conclusion. The real question is whether Section 22 of the Securities Act and § 1441 reflect a congressional intent to give a claimant under the Securities Act his choice of forum even though he joins a separate and independent claim. If Congress did so intend, a Securities Act plaintiff cannot be said to have waived his right to such a joinder.

Neither do I find, as Professor Cohen suggests, that the policies underlying Section 22(a) and § 1441(c) clearly dictate an answer. Section 22(a) reflects a congressional solicitude for Securities Act claimants and grants them their choice of forum for litigating their claims. Conflicting with this policy is the apparent twofold purpose of § 1441(c): (a) to assure that a defendant entitled to a federal forum for the litigation of a federal claim or a claim by a citizen of a different state will not be deprived of that right by his adversary's joinder of a nonremovable, separate and independent claim and (b) at the same time to assure that all claims which should be

9. While there is authority for the proposition that an F. E. L. A. plaintiff may waive his right to a state forum by his failure to move for remand in the federal court, Bailey v. Texas Co., 47 F. 2d 153 (2nd Cir. 1931); Jacobson v. Chicago, M. St. P. & P. Ry. Co., 66 F. 2d 688 (8th Cir. 1933); Woodward v. D. H. Overmeyer Co., 428 F. 2d 880 (2nd Cir.), cert. denied, 400 U. S. 993, 91 S. Ct. 460, 27 L. Ed. 2d 441 (1970), such a waiver should be clearly distinguished from a waiver predicated upon the joinder of claims in the state court.

litigated together for reasons of judicial economy be litigated in the same forum. Because of this conflict, the problem resolves itself into drawing a line where Congress intended the right granted a Securities Act claimant to cease and the protection granted defendants to commence. Congress could reasonably have drawn the line either to include or to exclude this type of case from the removable class.

The answer I believe is to be found in an analysis of § 1441.[10] This statute contains two grants of removal jurisdiction. Subsection (a) grants the general right of removal to defendants in any case that could originally have been brought in a district court of the United States. The first clause of that subsection limits this authority to cases where a contrary result has not been "otherwise expressly provided by Act of Congress." This is a clear refer-

10. § 1441:

"(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction."

ence to statutes like Section 22(a). Subsection (b) further limits this general removal jurisdiction in diversity cases to cases where no defendant is a resident.[11]

Subsections (a) and (c) "refer to two completely different situations." Port of New York Authority v. Eastern Air Lines, Inc., 259 F. Supp. 142, 145 (E. D. N. Y. 1966). Subsection (c) grants additional removal jurisdiction in a class of cases which would not otherwise be removable under the prior grant of authority. It assumes the existence of a separate and independent claim which would not be removable under that prior grant. A literal reading of Section 1441 demonstrates that Subsection (c) is not subject to the restriction contained in the first clause of Subsection (a). Moreover, nothing in the language of Subsection (c) suggests a Congressional distinction between two classes of suits "otherwise non-removable" within the contemplation of that subsection, i. e., those non-removable because they fall completely without the original jurisdiction of the federal district courts and those which, although dealing with federal questions, are made non-removable by Congressional pronouncement.

I, accordingly, conclude that Section 22(a) restricts the grant of general removal jurisdiction found in Subsection (a). However, in a case where a separate and independent claim, which would be removable if sued upon alone, is joined with one or more otherwise removable claims, whether made non-removable by Section 22(a) or otherwise, Subsection (c) is the governing provision and authorizes removal of the entire case.

11. Because Subsection (b) is a limitation on the grant of authority contained in Subsection (a) and not a separate grant of authority, the absence of an "except as otherwise provided" claim in Subsection (b) is not significant for present purposes.

III. The Validity of the Sequestration.

The motions to quash the sequestration assert two arguments common to both: (1) Gregg owned no sequesterable interest in the stock at the time of sequestration and (2) Delaware's sequestration statute as here applied is violative of the Due Process Clause of the United States Constitution.

Gregg executed a $1,500,000 demand note in favor of the Bank on December 28, 1971. The note reflected that the USI stock involved was pledged to secure this indebtedness and gave the Bank the right, among other things, (1) to pledge or transfer the note and collateral to any other pledgee, (2) to transfer all of the collateral to its own name or to the name of its nominee, (3) to vote the stock, (4) to direct that any dividend payments on the stock be made to it, (5) to "demand, sue for, collect or make any compromise or settlement it deems desirable with reference to the collateral," (6) to take control of any proceeds of the collateral and (7) to exercise the "remedies" of a secured party under the Uniform Commercial Code, if the Bank "deemed itself insecure or upon the occurrence of any default."

The sequestration order was served upon USI on or about June 19, 1972. The stock was then registered in the name of Gregg. As of July 27, 1972, the collateral was valued by the Bank at $2,066,333.62.

The loan transaction was negotiated and closed in Florida. The law of Florida determines the nature and extent of Gregg's interest, if any, in the stock.[12] The law of Delaware controls the question of whether any such interest may be sequestered under 10 Del. C. § 366.

12. The relevant portions of Florida's version of the Uniform Commercial Code do not, however, differ from those of the Delaware version.

Cheff v. Athlone Industries, Inc., 233 A. 2d 170 (Del. Sup. Ct. 1967); Nickson v. Filtrol Corporation, 265 A. 2d 425 (Del. Ch. 1970).

An examination of Florida law reveals that Gregg had not transferred his entire interest in the stock to the Bank at the time of sequestration. The rights retained under Article 9 of Florida's Uniform Commercial Code by a debtor who has conveyed a security interest in collateral apply "whether title to collateral is in the secured party or in the debtor." 19C Fla. Stat. Ann. § 679.9-202 (West 1966). These rights include the right of return of the collateral upon fulfillment of the debtor's obligations. *Id.* § 679.9-506. This right is expressly recognized in the Gregg note; it is, in any event, unwaivable. *Id.* § 679.9-501.

The rights reserved to the debtor under Article 9 are rights in the collateral itself and may be transferred voluntarily or involuntarily. *Id.* § 679.9-311 provides:

> "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement prohibiting any transfer or making the transfer constitute a default."

Stock in a Delaware corporation is personal property having its situs in Delaware. 8 Del. C. § 169. Accordingly, interests therein coming within the scope of 10 Del. C. § 366 are sequesterable in Delaware for the purpose of compelling the appearance of non-resident defendants. Hodson v. The Hodson Corporation, 32 Del. Ch. 76, 80 A. 2d 180 (1951). Somewhat surprisingly there is no reported Delaware case directly ruling on whether one in Gregg's position has an interest sequesterable under

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10 Del. C. § 366.[13] I am convinced, however, that a Delaware court confronted with the question would rule in the affirmative.

Section 366 authorizes the Court of Chancery to "compel the appearance of the defendant by the seizure of all or any part of his property." The word "property" as here used has "a broad and comprehensive meaning, including legal and equitable interest in both real and personal property," and is not limited to property interests seizable by foreign attachment at law. Blumenthal v. Blumenthal, 28 Del. Ch. 1, 35 A. 2d 831, 836 (1944), aff'd 28 Del. Ch. 448, 59 A. 2d 216 (1945); Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A. 2d 365 (1955). With this understanding as a base, Delaware courts, confronted with questions of whether interests in stock were sequesterable, have asked whether the specified interest was cognizable at law or equity, whether it was susceptible of sufficient identification to permit seizure, and whether it was saleable. Blumenthal v. Blumenthal, *supra;* Green v. Johnston, 34 Del. Ch. 115, 99 A. 2d 627 (Sup. Ct. 1953). Here Gregg's interest is so cognizable, so identifiable and so alienable. Accordingly, I conclude that it is sequesterable.[14] Dela-

13. There have been a number of cases where pledged stock has been sequestered, but in all to which this Court has been referred, the pledgee has apparently been content with modification of the sequestration order in a manner which recognized its senior rights.

14. "Bare legal title" (i.e., registered ownership) is sequesterable, the property being subject to release only upon a showing that its retention or sale would defeat or interfere with equitable interests therein. Rebstock v. Lutz, 39 Del. Ch. 25, 158 A. 2d 487 (Sup. Ct. 1960). Equitable interests of limited scope have been held to be sequesterable. In the *Blumenthal* case the plaintiff creditor had alleged that there had been a fraudulent conveyance of stock by the defendant Blumenthal to his sister, Miriam Rogers. The court held:

> ". . . Miriam Rogers is the legal owner of the stock, and Blumenthal has no equitable rights therein, as between them;

ware's Uniform Commercial Code confirms this conclusion. Section 9-311 of Title 5A of the Delaware Code, like its Florida counterpart quoted above, provides that a "debtor's rights in collateral may be . . . involuntarily transferred (by way of sale . . . attachment, levy, garnishment or other judicial process)." [15]

Winitz v. Kline, 288 A. 2d 456 (Del. Ch. 1971) does not dictate a contrary conclusion. In that case an order of sequestration had been entered directing the seizure of shares of a Delaware corporation "registered in the name of" the defendant Kline. Prior to the seizure, Kline and the other twenty-nine holders of the corporation's outstanding stock had entered a voting trust agreement. The certificates were surrendered by the five voting trustees to the corporation for cancellation and eight new certificates had been issued in the name of the voting trustees. Under the voting trust agreement the depositing stockholders were issued voting trust certificates. The certificates evidenced the holder's right upon termination of the trust to receive a specified number of "fully paid and nonassessable shares of the capital stock" and his right to "receive payments equal

14. (Cont'd.)
but it appears that the complainant is a defrauded creditor who stands in a very different position. As between her and Blumenthal, the latter had property rights in the stock, subject to seizure under the statute, which enabled valid substituted service to be had on him. . . ." 35 A. 2d p. 836.

The fact that an interest is contingent or unmatured does not make it non-sequesterable. Weinress v. Bland, 31 Del. Ch. 269, 71 A. 2d 59 (1950).

15. Section 8-317 of Delaware's Uniform Commercial Code provides that nothing in the Code shall "amend or in any way effect" the provisions of Section 366 and that to the extent that any such provision is inconsistent with Section 366, it shall control. Arguably this might preclude reference to Section 9-311 for the purpose of defining property under Section 366. As the Study Comment on Section 9-311 indicates, however, that Section is a reflection of pre-existing Delaware law.

to the cash dividends received by the . . . [trustees] upon a like number of shares of capital stock of . . . [the corporation], less the amount of any expense chargeable to the holder."

The Chancellor noted initially that the case was not identical to earlier Delaware cases which had held that a trustee holds the entire interest in corporate stock constituting the corpus of the trust and that the beneficiaries of the trust, while possessing an equitable interest in the trust, had no interest in the stock itself. *E.g.,* Nickson v. Filtrol Corporation, *supra.* The reason for this observation was a line of Delaware cases which state that a stockholder who deposits his stock in a voting trust retains "beneficial" ownership of the stock for some purposes. Sundlun v. Executive Jet Aviation, Inc., 273 A. 2d 282 (Del. Ch. 1970); Clarke Memorial College v. Monaghan Land Co., 257 A. 2d 234 (Del. Ch. 1969); Smith v. Biggs Boiler Works Co., 33 Del. Ch. 183, 91 A. 2d 193 (1952); Chandler v. Bellanca Aircraft Corporation, 19 Del. Ch. 57, 162 A. 63 (1932). The Chancellor held, nevertheless, that the holders of the voting trust certificates in the case before him did not have a sequesterable interest in the corporate stock held by the trustees as a trust corpus.

Two reasons were cited by the Chancellor for his conclusions: (1) the order directed seizure only of common stock registered in the name of Kline and at the time of the seizure no shares were so registered and (2) any interest which Kline had in the stock was neither capable of effective seizure nor capable of being sold. In connection with the second point the Chancellor pointed out that effective seizure requires that the stock in which the defendant has an interest must be readily identifiable. Greene v. Johnston, 34 Del. Ch. 115, 99 A. 2d 627 (Sup. Ct. 1953). He observed that in the case before him any beneficial in-

terest of Kline could not "be related to specific blocks of stock or lots of shares held by the trustees." The Chancellor further found that any such interest could not be sold without disregard of the rights of third parties in the voting trust. In this connection he pointed out that while the interest evidenced by the voting trust certificates might be effectively transferred, seized and sold, the sequestration had been directed to the corporate shares and not to the voting trust certificates.

None of the deficiencies present in the *Winitz* case are present here. The sequestration order directed the seizure of shares held in the name of Gregg and shares held in the name of Gregg were seized. As indicated above, Gregg has an interest in all of those identifiable shares which is expressly made transferable, either voluntarily or involuntarily, by Section 9-311. That interest can be sold without "disregard to the rights" of the Bank.

Both Gregg and the Bank attack Delaware's sequestration statute as here applied on constitutional grounds. Gregg's attack is two-pronged. First he asserts that the sequestration of property of a non-resident defendant in a case having no substantial contact with Delaware violates due process. Additionally both Gregg and the Bank assert that the sequestration of property without prior notice and an opportunity to be heard violates due process.

Delaware's sequestration statute, 10 Del. C. § 366, authorizes the Court of Chancery, after the filing in that court of a complaint against a non-resident, to enter an order directing the defendant "to appear by a day certain to be designated." It then provides:

> "The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the

> defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security." [16]

Rule 4(db) of the Rules of the Court of Chancery, Del. C. Ann., which implements the provisions of the sequestration statute provides in part as follows:

> "(db) Service by Publication and Seizure. (1) No order shall be entered under 10 Del. C. § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a non-resident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

16. Subsection (c) of Section 366 provides as follows:

"Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

(a) As to each non-resident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements.

(2) Within three business days after the filing of such bond or bonds as may be required or within such other time as the court may fix, the Register shall, in addition to making the required publication, send by registered or certified mail to each defendant whose appearance is sought to be compelled a certified copy of the order and a copy of the pleading asserting the claim.

(3) After the filing of such bond or bonds as may be required by the order, but not later than 10 days after the date of the order of seizure, the sequestrator shall serve a certified copy of the order upon the person, persons or

corporation having possession or custody of the property or control of its transfer, and shall seize the property.

• • • • •

(5) The court may in its discretion and subject to statutory requirements dispense with or modify compliance with the requirements of any part of this rule in any cause upon application to it stating the reasons therefor."

Gregg's first argument is based upon International Shoe v. Washington, 326 U. S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) and its progeny. He asserts that "under modern concepts of due process, a court cannot assert jurisdiction unless either the defendant or the subject matter of the action had at least minimal contacts with the forum."

The "minimal contacts" doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court. While a contrary view has been urged as the wiser one,[17] the courts have accepted the view of Justice Holmes that the "foundation of jurisdiction is physical power." [18] Just as a court may exercise *in personam* jurisdiction in a suit on a transitory cause of action where the only contact with the forum state is personal service upon the defendant within that state,[19] so also may a court exercise jurisdiction over prop-

17. See e.g., Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens, 65 Yale L. Rev. 289 (1956); Carrington, The Modern Utility of Quasi In Rem Jurisdiction, 76 Harv. L. Rev. 303 (1962). These commentators, however, recognize the prevailing view.

18. McDonald v. Mabee, 243 U. S. 90, 91, 37 S. Ct. 343, 61 L. Ed. 608 (1915). See also Goodrich, Conflicts of Law, § 73 (1965).

19. E.g., Fauntleroy v. Lum, 210 U. S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908); Restatement, Conflict of Laws, §§ 77, 78; Goodrich, Conflict of Laws, § 73 (1964).

erty within its control regardless of the presence or absence of other contacts with the forum state.[20] Where the court has either of these foundations for the exercise of its power, it may constitutionally proceed, though the absence of substantial contacts with the forum may lead it to decline to do so under the familiar principles underlying the doctrine of *forum non conveniens*[21] and the federal transfer provisions of 28 U.S.C. § 1404.

The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state.[22] Thus, where the stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a non-resident who has had no prior contacts with the forum state. Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A. 2d 428 (Del. Sup. Ct. 1963); Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1920).[23]

Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that an avowed purpose of Dela-

20. *Cf.* Hanson v. Denckla, 357 U. S. 235, 246, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1957); Beal, Conflicts of Laws, §§ 106.3, 107.3 (1935); Goodrich, Conflicts of Law, § 70 (4th Ed. Scoles 1964).

21. E.g., Gulf Oil Corp. v. Gilbert, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); General Foods Corp. v. Cryo-Maid, Inc., 41 Del. Ch. 474, 198 A. 2d 681 (Del. Sup. Ct. 1964). The cases relied upon by Gregg arise because of the difficulty of applying traditional concepts of *in personam* jurisdiction over individuals in suits against foreign corporations. Even in such cases if the corporation's activities in a state are substantial enough it is ordinarily subject to suit there on causes of action unrelated to the business conducted in the forum state. See e.g., Restatement (Second) Conflict of Laws, § 47 (1971).

22. Rogers v. Guaranty Trust Co., 288 U. S. 123, 53 S. Ct. 295, 77 L. Ed. 652 (1932); Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 20 S. Ct. 559, 44 L. Ed. 647 (1899).

23. See note 26 *infra*.

ware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the non-resident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiffs' claim.[24]

The second attack on the constitutionality of Delaware's sequestration procedure is grounded on Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972). The reliance upon that case is misplaced.

In *Fuentes* the Supreme Court struck down Pennsylvania and Florida replevin statutes under which personal property had been seized without notice or an opportunity to be heard. The court's holding was not, however, as broad as Gregg and the Bank contend. It is significant that the court noted:

> "There are 'extraordinary situations' that justify postponing notice and opportunity for a hearing. Boddie v. Connecticut, supra, 401 U. S. 371, at 379, 91 S. Ct. 780, 28 L. Ed. 2d 113. These situations, however, must be truly unusual. Only in a few limited situations has this Court allowed outright seizure without opportunity for a prior hearing. First, in each case, the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the

24. 10 Del. C. § 366; Hanson v. Denckla, 357 U. S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958); *cf.* Jacobs v. Tenney, 316 F. Supp. 151 (D. Del. 1970); Restatement of Judgments, § 34 comment f (1942).

seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance . . . ."

In connection with these observations the Supreme Court cited with approval Ownbey v. Morgan, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1920), describing it as a case which "involved attachment necessary to secure jurisdiction in [a] state court—clearly a most basic and important public interest." [25] In *Ownbey* the Supreme Court rejected a constitutional attack on the exercise of *quasi in rem* jurisdiction based upon the seizure of stock in a Delaware corporation under Delaware's foreign attachment statute.[26] Under that statute, there was no preseizure notice or hearing. While the opinion in the *Fuentes* case should not be read as endorsing all of the views stated in the *Ownbey* opinion, *Fuentes* does indicate that seizures of the kind made here are constitutionally permissible when the tripartite test set forth there is met.

The Supreme Court's footnote characterization of the attachment in the *Ownbey* case supplies the answer to the initial inquiry of whether the seizure was "directly necessary to secure an important governmental or general public interest." This is not a case like *Fuentes* where the statutes allowed "summary seizure" when "no more than [a] private gain is directly at stake." Fuentes v. Shevin,

25. Fuentes v. Shevin, 407 U. S. 67, 91, n. 23, 92 S. Ct. 1983, 1999, 32 L. Ed. 2d 556 (June 12, 1972).

26. Although neither the Delaware court nor the United States Supreme Court considered it significant, the *Ownbey* case appears to have been a suit by non-resident plaintiffs against a non-resident defendant arising out of the latter's activities as general manager of a Delaware corporation the activities of which were limited to the States of Colorado and New Mexico. Morgan v. Ownbey, 29 Del. 379, 6 Boyce 379, 100 A. 411 (1916).

supra at 93, 92 S. Ct. at 2000. As previously noted a state has a legitimate interest in the exercise of judicial jurisdiction with respect to property within its borders. Seizure for the purpose of securing such jurisdiction in a state court, accordingly, serves, in the words of the Supreme Court, "a most basic and important public interest." Fuentes v. Shevin, 407 U. S. 67, 92 S. Ct. 1983, 1999, 32 L. Ed. 2d 556, at n. 23. See also Lebowitz v. Forbes Leasing & Finance Corp., 456 F. 2d 979 (3rd Cir. 1972).[27]

Was there need for prompt action? Given the nature of the interest served by the seizure, the answer here must also be in the affirmative. Notice would afford the defendant an opportunity to defeat the state's interest in securing jurisdiction by the simple expedient of moving or transferring the property.[28] This distinguishes the present case from the situation involved in *Fuentes*. Those in possession of the property seized in *Fuentes* were subject to the *in personam* jurisdiction of the courts of Pennsylvania and Florida respectively and could be compelled to attend a hearing to make a preliminary determination of the rights in the property. The state's power to adjudicate was, accordingly, not in jeopardy. The interest served by the replevin statutes there under attack was the plaintiff's private interest in securing possession of personal property in which they claimed a possessory interest.

Finally, Delaware has kept a "strict control over its monopoly of legitimate force." The court's analysis of the

27. Gregg and the Bank seek to distinguish *Lebowitz* on the ground that plaintiffs' cause of action there arose in the forum state. Under the rationale of the opinions in *Lebowitz*, *Fuentes* and *Ownbey*, however, this does not appear to be a relevant consideration. Moreover, there are more contacts between this litigation and the State of Delaware than were present in *Ownbey*.

28. In the case of seizure of stock in a Delaware corporation, the latter would, of course, be the only option available for this purpose.

Pennsylvania and Florida statutes on this point is helpful in understanding the purpose of this third requirement. The court observed:

> "The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark."

Here, unlike *Fuentes*, the order effecting the seizure was issued by a state court judge. That judge had been supplied with a complaint and with an affidavit which revealed: (1) that Gregg was a non-resident and accordingly not subject to the *in personam* jurisdiction of the court, (2) that Gregg owned specifically described, alienable property within the State of Delaware, (3) the value of that property and (4) the source of the plaintiffs' information on these subjects. This information provided the basis for a determination that the seizure would be in furtherance of the "important public interest" underlying the sequestration statute and that prompt action would be required.[29]

29. Under the Delaware practice, a court presented with a motion for the issuance of a sequestration order may also determine from the complaint whether it is "bona fide on its face," Hughes v. Trans World Airlines, Inc., 40 Del. Ch. 552, 185 A. 2d 886 (1962), whether the action is of a kind where the exercise of *quasi in rem* jurisdiction is appropriate, Steinberg v. Shields, 38 Del. Ch. 349, 152 A. 2d 113 (1959), and whether the value of the property to be seized bears a reasonable relation to the amount of the claim asserted. Trans World Airlines Corp. v. Hughes, 40 Del. Ch. 523, 185 A. 2d 762, 765 (1962).

It may be argued that the defendant's interest might be better protected if the statute or the rule required the issuing court to make a preliminary finding, upon the basis of an ex parte presentation, that the plaintiffs' case has some merit.[30] However, as the Supreme Court noted in *Fuentes*, the protection offered by such an ex parte determination is largely illusory. Fuentes v. Shevin, *supra*, 407 U. S. 67, at 80-82, 92 S. Ct. 1983, at 1994. I do not believe such a procedure is constitutionally required where, as here, the required presentation reveals to the issuing judge a situation where immediate seizure will serve a legitimate state interest.[31]

In short, this is not a situation where the State of Delaware has abdicated "effective state control over state power . . . [to] private parties serving their own private advantage . . . ." Fuentes v. Shevin, *supra*, at 93, 92 S. Ct. at 2001. The procedure here attacked serves a public purpose as part of the ordered system of conflict resolution which includes the exercise of judicial power over property located within the state. Lebowitz v. Forbes Leasing & Finance Corporation, 456 F. 2d 979 (3rd Cir. 1972).

IV. Remand

Having decided that a separate and independent cause of action, removable under 28 U. S. C. § 1441(a) and

30. This is not required under Delaware law. Hughes v. Trans World Airlines, Inc., 40 Del. Ch. 552, 185 A. 2d 886 (1962).

31. The distinction between the public interest foundation of the sequestration process and the private interest foundation of the *Fuentes* replevin statutes is reflected in the effect of the respective types of seizure. In *Fuentes* the state procedure had deprived one party of possession and had made it available to another without any determination regarding the merits of the latter's claim. In a sequestration context, the practical effect of the seizure is to immobilize the property and thereby protect the court's jurisdiction. The property may not be applied to the claim of the plaintiff until after there has been notice and an opportunity for the defendant to be heard.

(b), is stated in Claim 7, that the Court of Chancery had jurisdiction under its Order of Sequestration and, accordingly, that the derivative removal jurisdiction of this Court has been properly invoked, the Court must finally decide whether the claims "otherwise non-removable" ought to remain in this Court or, in the exercise of the discretion granted under 28 U. S. C. § 1441(c), ought to be remanded to the state court. Notwithstanding the separate and independent character of the claims asserted, I conclude that the public interest in the efficient administration of justice as well as the convenience of the parties and the witnesses will be best served by the litigation of all claims in one proceeding. See Baltimore Gas & E. Co. v. United States Fidelity & G. Co., 159 F. Supp. 738 (D. Md. 1958).

The motions to remand this case and to vacate the sequestration order are denied. This Court will retain jurisdiction of the entire case and determine all issues raised.

Submit order.

APPENDIX C.

U. S. INDUSTRIES, INC., A CORPORATION AND DIVERSACON INDUSTRIES, INC., A CORPORATION,
Plaintiffs,

v.

F. BROWNE GREGG,
Defendant.

Civ. A. No. 4431.

United States District Court,
D. Delaware.

Feb. 2, 1973.

David A. Drexler, of Morris, Nichols, Arsht & Tunnell, Wilmington, Del., and Olwine, Connelly, Chase, O'Donnell & Weyher, New York City, for plaintiffs.

Thomas S. Lodge, and John R. Bowman, of Connolly, Bove & Lodge, Wilmington, Del., and Bedell, Bedell, Dittmar, Smith & Zehmer, Jacksonville, Fla., for defendant.

OPINION

STAPLETON, *District Judge:*

This action was originally filed in the Court of Chancery of the State of Delaware. Plaintiff, U. S. Industries, a Delaware corporation ("USI"), immediately secured an order from that court which sequestered certain shares of USI stock owned by the defendant Gregg, a

Florida resident, under Delaware's sequestration statute, 10 Del. C. § 366. Gregg, before making any response in the Court of Chancery, removed the case to this Court. In subsequent proceedings, this Court held that the sequestration was valid and that the case was properly removed under 28 U. S. C. § 1441(c). The complaint asserted both federal and state claims. The holding on the removal question, however, was based upon a finding that plaintiff had alleged "a separate and independent claim" which "would have been removable if sued upon alone" because of diversity of citizenship and the presence of the requisite jurisdictional amount. See U. S. Industries v. Gregg, 348 F. Supp. 1004 (D. Del. 1972).

Before the time for defendant's answer, he moved for leave to enter a "limited" or "restricted" appearance, claiming the right to defend plaintiff's claims on the merits without subjecting himself to the *in personam* jurisdiction of the court and thus the right to limit the satisfaction of any judgment obtained by the plaintiff to the sequestered property itself. This motion is now before the Court for decision.[1]

1. Plaintiff, relying on F. R. Civ. P. 12(g), maintains that Gregg waived any right he may have had to the relief here sought by failing to request that relief in conjunction with his attack upon the sequestration. I conclude, however, that Rule 12(g) is inapplicable. While the motion is in a sense similar to a "defense of lack of jurisdiction over the person," at the time of the attack on the sequestration the plaintiff was not claiming, and the court clearly did not have, jurisdiction over defendant's person and there was no need to challenge jurisdiction which had not been asserted. While it would have perhaps been better practice to have joined the current request as one for alternative relief, this motion nevertheless raises substantial and important issues from the defendant's point of view in a largely uncharted area, and I conclude that disposition on grounds of waiver would not be in the interest of justice. Defendant's form of motion has been used in other circumstances to raise similar issues. E.g., Grant v. Kellogg Co., 3 F. R. D. 229 (S. D. N. Y. 1943); Sands v. Lefcourt Realty Corp., 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955).

Under the Delaware rule, as announced in Sands v. Lefcourt Realty Corp.,[2] Gregg would concededly be denied the permission he seeks. He asserts, however, that federal law controls the point and that, in any event, application of the Delaware rule would violate his right to due process of law under the Fourteenth Amendment to the United States Constitution. In this context, a number of questions are presented: (1) whether any federal statute or any of the Federal Rules of Civil Procedure decides the point either by way of declaring, expressly or by necessary implication, a federal rule or by incorporating the state rule, (2) if not, whether this Court should apply federal or state law, (3) if federal law is to be applied, what is the federal rule and (4) if Gregg's choice is limited to one between default and general appearance, will he be deprived of due process?

I. The Federal Statutes and Rules.

Due process questions aside, this is an area in which Congress by statute, or the Supreme Court by rule, could, consistent with Erie v. Tompkins[3] and the Constitution, establish a controlling rule for decision.[4] Neither, however, has chosen to do so.

Section 1450 of Title 28 provides in part:

> Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of

2. 35 Del. Ch. 340, 117 A. 2d 365 (Sup. Ct. 1955).

3. Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

4. Hanna v. Plumer, 380 U. S. 460, 472, 85 S. Ct. 1136, 1144, 14 L. Ed. 2d 8 (1965) (holding that such power exists "to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.").

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> the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court.

USI urges that this statute incorporates Section 366 of Title 10 of the Delaware Code which, as the court in the *Sands* case found, was drafted with the idea that limited appearances would not be available. The purpose of Section 1450, however, is to give a state attachment the same effect in a federal court after removal as it would have had in the state court; it incorporates state law to this extent.[5] I find no suggestion in the text of the statute, however, that it was intended to refer a federal court to state law for a determination of when the federal court obtains *in personam* jurisdiction and when it does not.[6]

Federal Rule 81(c) provides that the Federal Rules of Civil Procedure shall apply to removed actions and shall "govern procedure after approval." No other federal rule, however, can be said to govern the question before this Court either expressly or by necessary implication. Rule 4(e) as amended in 1963, permits the institution of actions in a federal court by attachment and provides that "service shall be made . . . under the circumstances and

5. 1A Moore, Federal Practice, ¶ 0.168 [4-5].

6. This reading does not produce the procedural quagmire and jurisdictional dilemma which plaintiff predicts. Section 366 does require the Court of Chancery to release the seized property upon the entry of a "general appearance, absent a showing that release will make it 'substantially less likely that plaintiff will obtain satisfaction of any judgment secured.'" It does not follow, however, that this Court, in obeying the command of Section 1450 to hold the property under Section 366, would be required to act similarly upon the entry of a limited appearance and thereby lose its sole basis for jurisdiction.

in the manner prescribed in . . . [a state] statute or rule." Its scope is thus limited to service of process and does not extend further.[7] The "legislative" history so indicate.[8]

Rule 12 in describing the responses to a complaint does not, it is true, refer to the possibility of a "limited appearance." This has helped one court to the conclusion that the rule excludes this alternative.[9] Moreover, Rule E(8) of the Supplemental Rules for Certain Admiralty and Maritime Claims, by contrast, expressly provides for limited appearances in the cases which it governs. But the temptation to draw a negative inference from the omission of a reference to limited appearances in Rule 12 should be resisted in light of the relevant advisory committee comments. The comments relating to Rule 12 do not indicate that any judgment was made on the issue.[10] The comment in connection with the 1963 amendments to Rule 4 likewise contained no mention of the problem.[11] The 1963 amendment to Rule 13 and the 1965 adpotion of admiralty rule E(8), however, produced affirmative evidence that the committee intended to "leave the matter

7. *Cf.* Arrowsmith v. United Press International, 320 F. 2d 219, 224 (2nd Cir. 1963).

8. See notes 10 and 11, *infra;* Kaplan, Amendments of the Federal Rules of Civil Procedure, 1961-1963, 77 Harv. L. Rev. 601, 627-28 (1964). Prof. Carrington has taken the position that since the "whole thrust of the [proposed] Rule 4(a) amendment is a reference to state law it may be presumed that the Committee would contemplate . . . use [of the limited appearance only] in states in which it is permitted in local courts." Carrington, The Modern Utility of Quasi in Rem Jurisdiction, 76 Harv. L. Rev. 303, 314 (1962). The Comments seem to indicate that the Committee did not so contemplate, however.

9. Grant v. Kellogg Co., 3 F. R. D. 229 (S. D. N. Y. 1943).

10. Notes of the Advisory Committee, 28 U. S. C. Rule 12 (1972 Supp.).

11. Notes of Advisory Committee, 28 U. S. C. Rule 4 (1972 Supp.).

open." [12] The consensus has, accordingly, been that the Federal Rules of Civil Procedure do not speak to the question now before this Court.[13]

II. Whether State or Federal Law Governs

Upon analysis, this second question presents two separate issues. While this Court's jurisdiction in this case is founded solely on the presence of a separate and independent diversity claim, plaintiff asserts a claim having its source in federal law [14] as well as claims grounded upon state law, and it is the source of a claim, rather than the basis of federal jurisdiction, which is relevant in determining the law applicable to that claim. As the court observed in Maternally Yours, Inc. v. Your Maternity Shop, Inc., 234 F. 2d 538, 540 n. 1 (2nd Cir. 1956):

> . . . despite repeated statements implying the contrary, it is the *source* of the right sued upon, and not the ground on which federal jurisdiction over the case is founded, which determines the governing law. . . .

12. Note, "The 'Right' to Defend Federal Quasi in Rem Actions Without Submitting to the Jurisdiction of the Court," 48 Iowa L. Rev. 441, 442 n. 8 (1963); Notes of Advisory Committee, Admiralty & Maritime Rule E (Appendix to 28 U. S. C. A.).

13. 2A Moore, Federal Practice, ¶ 12.13 p. 2333; 4 Wright & Miller, Fed. Prac. § 1123, p. 514. The situation here is different from that which confronted the court in Neifeld v. Steinberg, 438 F. 2d 423 (3rd Cir. 1971). There the court held that the joinder of a permissive counterclaim with a defense of lack of jurisdiction over the person did not waive the latter defense where the defendant had withdrawn the counterclaim without leave of court. Rule 12, while not expressly reading on the relevant question, was found to embody a scheme regarding responsive pleading and waiver which was inconsistent with the view that a waiver had occurred.

14. Section 17(a) of the Securities Act of 1933, 15 U. S. C. A. § 77q(a) (1971). Section 22(a) of that act would preclude removal if this claim were the only one asserted. USI v. Gregg, 348 F. Supp. 1004 (D. Del. 1972).

> Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. See, e. g., Rotherberg v. H. Rothstein & Sons, 3 Cir., 1950, 183 F. 2d 524, 21 A. L. R. 2d 832. *Cf.* Wichita Royalty Co. v. City National Bank, 1939, 306 U. S. 103, 107, 59 S. Ct. 420, 83 L. Ed. 515.

The converse is also true; where a diversity case includes a federal claim, the source of that claim is the relevant factor.[15]

This Court must, accordingly, consider Gregg's rights with respect to the federal claim as well as with respect to his state claims. While these choices of law involve analyses which are similar in some respects, the controlling principles and precedents are different.

A. *The State Claims.*

Under Erie v. Tompkins [16] and its progeny [17] three questions are now relevant in determining whether state law or federal law will govern a question arising in connection with the assertion of a state created right: (1) whether the state rule is "bound up with . . . [state created] rights and obligations in such a way that its application in the federal court is required," [18] (2) if not, would failure to follow the state rule be "outcome determinative"—that is, would it so materially affect the char-

15. 1A Moore, Federal Practice, ¶ 0.305[3] p. 3054.

16. 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938).

17. E.g., Guaranty Trust Co. v. York, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079 (1945); Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 2d 953 (1958); Hanna v. Plumer, 380 U. S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).

18. Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525, 535, 78 S. Ct. 893, 899, 2 L. Ed. 2d 953 (1958).

acter or result of the litigation as to cause forum shopping or inequitable administration of the laws, and (3) even if failure to follow the state rule might produce either of these undesirable consequences, is there, nevertheless, a countervailing "strong federal policy" [19] which requires the application of federal law.[20] If the state rule is closely "bound up" with the state created claim, state law must be applied. Even if the state rule is one of "form and mode," however, state law must be applied, in the absence of a strong countervailing federal policy, where the choice of federal law would lead to either of the aforementioned "twin evils" denounced in *Erie*.[21]

To state the relevant inquiries in this fashion does not, of course, close debate. There is no "automatic 'litmus paper' criterion." [22] It does, however, provide the guidelines for decision.

The rule of Sands v. Lefcourt Realty Corp. is not intimately bound up with the state rights which plaintiff here seeks to enforce. The policy behind the rule, namely to require that any adjudication on the merits of a claim permanently settle the rights of the parties with respect to that claim,[23] "reflects essentially institutional considera-

19. *Id.* at 536, 78 S. Ct. 893.

20. The Third Circuit Court of Appeals has read *Erie* and its progeny to indicate that these are the relevant questions. Lynne Carol Fashions, Inc. v. Cranston Print Works Co., 453 F. 2d 1177 (3rd Cir. 1972). See also Neifield v. Steinberg, 438 F. 2d 423 (3rd Cir. 1971); Atkins v. Schmutz Manufacturing Co., 435 F. 2d 527 (4th Cir. 1970).

21. Hanna v. Plumer, 380 U. S. 460, 468, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).

22. *Id.* at 460, 85 S. Ct. 1136.

23. A quasi-in-rem judgment does not have a *res judicata* effect on a subsequent action on the same claim, and collateral estoppel does not apply even as to issues actually litigated as long as the judgment is against the property and not the person. Restatement of Judgments § 76 (1942); 4 Wright & Miller, Fed. Prac. & Proc. § 1070 (1969).

tions relevant to the administration of justice" within the Delaware court system and is "unrelated to the basic rights and obligations of the parties." [24]

In a state which permits "limited appearances," [25] the presence of a contrary rule in the federal courts of that state would obviously be an important factor in the plaintiff's choice of forum.[26] Similarly, where a state, like Delaware, does not permit limited appearances,[27] application of a contrary rule in the federal court would undoubtedly affect the nonresident defendant's election under the removal statute. 28 U. S. C. § 1441. While the choice would here be made in a different context from that before the court in *Erie*, the effect would be the same—the granting to a non-resident of a choice of law affecting the character and result of the litigation for reasons wholly unrelated to the purpose of diversity jurisdiction.

Since the choice of law on the question before this Court would be "outcome determinative" as that phrase

24. Atkins v. Schmutz Manufacturing Co., 435 F. 2d 527, 537 (4th Cir. 1970). The *Sands* rule would be applied by the Delaware courts in cases of this kind to rights created by the laws of another state. Here, for example, Florida law appears to be the source of at least some of the claims which plaintiff seeks to enforce. The fact that Delaware classifies the right as "procedural" for this purpose, does not, of course, require this Court to so characterize it for present purposes. Sampson v. Channell, 110 F. 2d 754 (1st Cir. 1940).

25. E.g., Maryland: Miller Brothers Co. v. State, 201 Md. 535, 95 A. 2d 286 (1953); Massachusetts: Cheshire National Bank v. Jaynes, 224 Mass. 14, 112 N. E. 500 (1916); Oklahoma: Osborn v. White Eagle Oil Co., 355 P. 2d 1041 (Okl. 1960).

26. B. Currie, Attachment and Garnishment in the Federal Courts, 59 Mich. L. Rev. 337 (1961); 4 Wright & Miller, Federal Prac. & Proc. § 1123 at 514-515. While the potential discrimination here would be against a non-resident rather than a resident as in *Erie*, the policy of that case may still apply. Note, 15 Corn. L. Q. 560, 563 (1963).

27. E.g., Oregon: State ex rel. Methodist Old People's Home v. Crawford, 159 Or. 377, 80 P. 2d 873 (1938); Rhode Island: Industrial Trust Co. v. Rabinowitz, 65 R. I. 20, 13 A. 2d 259 (1940).

has been construed by the Supreme Court,[28] state law must be applied unless there is a countervailing "strong federal policy." Whether such a policy exists is a question which I believe the federal courts should approach with restraint. If a federal rule exists or can be formulated, a federal policy, in a sense, will be present by definition. A federal rule of limited appearance could be said to rest upon a federal policy against the dilemma in which a general appearance rule places the defendant. A federal rule of general appearance could be said to rest on a federal policy against re-litigation of issues. The "strong federal policy" exception, however, should be limited to cases where the federal policy is clearly established by the federal constitution or a federal statute and where application of the state rule would "alter the essential character of function of a federal court." [29] An extension of the exception beyond such cases would lead to a return to the philosophy of the Swift v. Tyson era and, under the theoretical guise of protecting an interest in uniformity among the federal courts, create, in fact, as many different "federal rules" as there are views on what constitutes "strong federal policy." [30]

In this instance, I find no clearly defined, federal policy relating to the essential character of the federal judicial system. As hereinafter indicated, the Constitution neither dictates nor clearly embodies a policy supporting, one rule or the other. The same is true of the federal

28. Hanna v. Plumer, 380 U. S. 460, 85 S. Ct. 1136, 14 L. Ed. 2d 8 (1965).

29. Byrd v. Blue Ridge Rural Electric Cooperative, 356 U. S. 525, 539, 78 S. Ct. 893, 901, 2 L. Ed. 2d 953 (1958).

30. See Note, "State Statutes of Limitations in Federal Courts: By Whom the Statute Tolled," 1971 Duke L. J. 785, 790-799, 801-803. While Supreme Court review would establish "uniformity" conflict in the lower court "policy calls" would by no means assure Supreme Court review. See Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465 (1953).

statutory law. The sparse federal case law is in conflict.[31] Moreover, application of one rule or the other will not disrupt or alter the essential character of the federal proceeding. If the defendant defends on the merits, the issues will be litigated and decided in precisely the same manner whether the appearance is general or limited. If the defendant fails to appear, the case will also proceed in precisely the same manner. In short, there is an "absence of any established federal principle or discernible federal policy on the point." [32]

Accordingly, this Court considers itself bound to apply the rule of Sands v. Lefcourt Realty Corp. to plaintiff's state court claims.

B. *The Federal Claim.*

The Supreme Court of the United States has stated on a number of occasions that the doctrine of Erie v. Tompkins is inapplicable where a federally created right is involved.[33] The meaning and ramifications of these statements have not been fully articulated by that court, however, and are subjects about which there has been considerable academic comment.[34] Some conclusions may

31. See review of cases in 2A Moore, Federal Practice ¶ 12.13 pp. 2330-2334.

32. 4 Wright & Miller, Fed. Prac. & Proc. § 1123 p. 515.

33. Board of Commissioners v. United States, 308 U. S. 343, 60 S. Ct. 285, 84 L. Ed. 313 (1939); Deitrick v. Greaney, 309 U. S. 190, 60 S. Ct. 480, 84 L. Ed. 694 (1940); D'Oench, Duhme & Co. v. F. D. I. C., 315 U. S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942) (Jackson, J., concurring); Levinson v. Deupree, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953).

34. See e.g., Hill, State Procedural Law in Federal Nondiversity Litigation, 69 Harv. L. Rev. 66 (1955); Mishkin, The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. of Pa. L. Rev. 797 (1957); Note, Rules of Decision in Nondiversity Suits, 69 Yale L. J. 1428 (1960); Note, The Competence of Federal Courts to Formulate Rules of Decision, 77 Harv. L. Rev. 1084 (1964).

nevertheless be drawn from the cases in this area. Legitimate state interests, where they exist, may not be ignored in making the choice of law even where a federal claim is at issue.[35] In a few instances state rules have been applied even as to matters which would be "procedural" in traditional conflicts terminology.[36] In cases where the matter is one of procedure in that sense, however, rarely will there be a significant state interest in having a state rule applied to the enforcement of a federal claim even though it be "outcome determinative" in *Erie* terms.[37] Ordinarily, such state rules are applied only when circumstances are such that Congress may fairly be said to have intended their adoption.[38] Even where state interests exist, however, they must yield to any federal interest discernible from the federal legislation giving rise to the claim,[39] from considerations involving executive administration of the federal law[40] or from the character of the federal judicial system.[41]

35. E.g., United States v. Yazell, 382 U. S. 341, 86 S. Ct. 500, 15 L. Ed. 2d 404 (1966). Whether this is dictated by the Rules of Decisions Act, 28 U. S. C. § 1652, or is discerned from the principles underlying our federal system has not been authoritatively determined. See Mishkin, *supra*, note 34; Hill, *supra*, note 34.

36. Camden & Suburban Ry. Co. v. Stetson, 177 U. S. 172, 20 S. Ct. 617, 44 L. Ed. 721 (1900) (applying state rule permitting physical examination of a plaintiff); Campbell v. Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280 (1895) (applying state limitations statute); Hill, *supra*, note 34.

37. Hill, *supra*, note 34 at 91-94. Where a procedural rule is "outcome determinative" it may be held that it conflicts with the federal statute which created the right and, for that reason, must not be applied even if a state court proceeding. E.g., Brown v. Western Ry., 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949); Dice v. Akron, C. & Y. R. Co., 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

38. E.g., Campbell v. Haverhill, 155 U. S. 610, 15 S. Ct. 217, 39 L. Ed. 280 (1900); Chattanooga Foundry and Pipe Works v. Atlanta, 203 U. S. 390, 27 S. Ct. 65, 51 L. Ed. 241 (1906); Brazier v. Cherry, 293 F. 2d 401 (5th Cir. 1961).

39. D'Oench, Duhme & Co. v. F. D. I. C., 315 U. S. 447, 62 S. Ct. 676, 86 L. Ed. 956 (1942); Clearfield Trust Co. v. United States, 318 U. S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943).

Accordingly, while the guidelines of *Erie* and its progeny are not applicable to the resolution of choice of law problems in a federal claim context, the choice in that context nevertheless also involves a process of ascertaining any relevant state and federal interests. Here the problem is not difficult of resolution because I perceive no Delaware interest in whether this Court applies a limited or general appearance rule in a case being litigated in this Court to enforce a right created by the Securities Act of 1933.

I conclude, accordingly, that this Court is not required to apply the Delaware appearance rule to USI's federal claim. This leaves the Court with the task of choosing one of three alternatives based on what it is able to infer from the federal statutory, regulatory, rule and case law: (1) a general appearance rule, (2) a limited appearance rule, or (3) a rule of adoption of state law.

III. The Appropriate Federal Rule.

It is unnecessary in this case to formulate a federal rule applicable to all cases under the Securities Act of 1933 which are litigated in a federal court.[42] This case arises under rather unusual circumstances and a choice for the present case is sufficient.

40. United States v. Hext, 444 F. 2d 804 (5th Cir. 1971); United States v. Sommerville, 324 F. 2d 712 (3rd Cir. 1963).

41. Monarch Insurance Co. v. Spach, 281 F. 2d 401 (5th Cir. 1961); Dallas County v. Commercial Union Assurance Co., 286 F. 2d 388 (5th Cir. 1961).

42. The present problem will arise rarely in a Securities Act case instituted originally in a federal court since the Act authorizes personal service outside the forum district in such case in any district where the defendant can be found. 15 U. S. C. A. § 77v.

Section 22(a) [43] of the Securities Act provides for concurrent state-federal jurisdiction over actions arising under the Act. Moreover, that section expressly prohibits removal of Securities Act claim brought in a state court. It is clear that out of solicitude for Securities Act claimants Congress intended one asserting a claim solely under the Act to be entitled to have his claim litigated in a state court. Delaware practice provides for *in personam* jurisdiction over the defendant if he appears to defend on the merits. Presumably, Congress contemplated that such a Securities Act plaintiff in Delaware would have the benefit of this rule.[44]

In this case USI joined its Securities Act claim with a "separate and independent" state claim. In its earlier opinion this Court noted the conflict between the policy behind the non-removal provisions of Section 22(a) and the twin policies of Section 1441(c): (1) to assure that a defendant entitled to a federal forum for litigation of a diversity claim or removable federal claim will not be deprived of that right by his adversary's joinder of a non-removable, separate and independent claim and (2) at the same time, to insure that all claims which should be litigated together for reasons of judicial economy be litigated in the same forum. Based on the text of Section 1441, this Court concluded that the policy of Section 22(a) must yield to those of Section 1441(c). The policies of Section 1441(c) do not, however, require that a suit which would be an *in personam* one in the forum of the plaintiff's choosing must

43. 15 U. S. C. A. § 77v.

44. Nothing in the Securities Act would provide a basis for a claim that Delaware would be required to apply federal law on this point, and in the absence of some such basis in the federal law, a state court is free to follow its own rules in a concurrent jurisdiction case. Brown v. Western Ry., 338 U. S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949); Dice v. Akron, C. & Y. R. Co., 342 U. S. 359, 72 S. Ct. 312, 96 L. Ed. 398 (1952).

become something entirely different if the suit is removed. Those policies can be effectuated without applying a limited appearance rule.

If USI were asserting solely a Securities Act claim it would be entitled, after litigating its claim on the merits in Delaware, to receive an *in personam* judgment pursuant to Delaware's general appearance rule. It would be anomalous, indeed, to deprive USI of this result merely because it also presses a "separate and independent" state law claim as to which, as I have held above, USI has a right to the application of the state rule.

In short, I conclude that a federal district court in a case of this character should apply the state rule of general appearance by adoption.

IV. The Constitutionality of the Rule of Sands v. Lefcourt Realty Corp.

Gregg correctly asserts that under the Due Process Clause of the Fourteenth Amendment he has a right to defend the property which has been seized. He concedes that a general appearance rule would not deprive him of an opportunity to defend but asserts that it would unconstitutionally condition his right to defend on the merits by requiring that he first submit himself to the *in personam* jurisdiction of the Court.

Not all conditions on the exercise of a Fourteenth Amendment right are constitutionally prohibited. Rule 13 and state compulsory counterclaim rules, for example, provide that a defendant, if he wishes to defend a plaintiff's claim, must pay a price for being permitted to do so—he must submit any claim he may have arising out of the same transaction for disposition by the Court or lose that claim.

The question, accordingly, is not whether Gregg's constitutional right to defend has been conditioned, but

rather whether it has been unreasonably conditioned.[45] What is reasonable or unreasonable in this context can only be answered with reference to the public interest involved in requiring a general appearance and the burden which such a rule places upon the defendant.

There is, in my judgment, a legitimate public interest behind the general appearance rule. If a state or federal court is required by a defendant's response to a complaint to try and determine all of the issues upon which an *in personam* claim turns, there is a public interest in having that expenditure of judicial resources settle the rights of the parties with respect to that claim and in not leaving open the possibility of subsequent, duplicative litigation

45. *Cf.* York v. Texas, 137 U. S. 15, 20, 11 S. Ct. 9, 10, 34 L. Ed. 604 (1890) (upholding the constitutionality of a Texas statute under which an appearance solely to attach service of process and jurisdiction over the person constituted a general appearance, thereby, in effect, requiring a non-resident to choose between entering a general appearance or losing his right to defend a claim on its merits in the event the service is found to be sufficient):

> The State has full power over remedies and procedure in its own courts, and can make any order it pleases in respect thereto, provided that substance of right is secured without unreasonable burden to parties and litigants.

Adam v. Saenger, 303 U. S. 59, 67-68, 58 S. Ct. 454, 458, 82 L. Ed. 649 (1938) (holding that a state may condition a non-resident plaintiff's right to litigate in its courts by requiring that he submit himself to the *in personam* jurisdiction of its courts for the litigation of unrelated claims against him without personal service of process on him):

> . . . The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff. Frank L. Young Co. v. McNeal-Edwards Co., 283 U. S. 398, 400, 51 S. Ct. 538, 539, 75 L. Ed. 1140; cf. Chicago & N. W. Ry. Co. v. Lindell, 281 U. S. 14, 17, 50 S. Ct. 200, 201, 74 L. Ed. 670.

McGautha v. California, 402 U. S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971).

in the same court or another.[46] This interest is similar to, though stronger, than,[47] the one reflected in compulsory counterclaim rules.

One must still ask, however, whether the price which a general appearance rule extracts from a defendant is excessive despite the countervailing public interest. Gregg suggests that it is because the forum, by definition, is one with which his only contact is the presence of his property within its jurisdiction. Requiring him to litigate in such a forum, he says, imposes an unconscionable burden. This Court has already held, however, that the acquisition of quasi-in-rem jurisdiction by sequestration is constitutional.[48] Given the right of a court to require that a defendant whose property is seized defend on the merits or default, it is difficult to see what additional litigation burden a general appearance rule imposes upon a defendant. If he defaults recovery will be limited to the property seized. If he defends on the merits the trouble and expense of litigation will be no different whether a general or limited appearance rule is applied.[49]

46. Note, The "Right" to Defend Federal Quasi in Rem Actions Without Submitting to the Personal Jurisdiction of the Court, 48 Iowa L. Rev. 441 (1963); Moore, Federal Practice, ¶ 12.13 n. 16; 4 Wright & Miller, *supra*, § 1123 at 514.

47. In a compulsory counterclaim context, the court, in the absence of a compulsory counterclaim rule, would not ordinarily be required to try and determine all of the issues upon which the counterclaim rests. The potential for waste of judicial resources, while present, is accordingly, not as great. For this reason, the 1963 amendment to Rule 13(a) (i.e. permitting a defendant brought into court under Rule 4(e) to withhold a compulsory counterclaim) is not relevant to any question here posed. It is one thing to conclude that it is fair to permit a defendant to withhold a separate claim from adjudication and quite another to conclude that fairness to a defendant requires that he be allowed two days in court on the same claim.

48. USI v. Gregg, 348 F. Supp. 1004 (D. Del. 1972).

49. As one commentator has observed, the arguments of inconvenience are more properly addressed to the question of

Also unpersuasive is Gregg's argument that a general appearance rule gives a plaintiff an unfair advantage by allowing him to bring suit on a large claim in a jurisdiction where the original basis for jurisdiction is the presence of property having a comparatively small value. Any such unfairness does not rise to constitutional proportions. A similar phenomenon frequently occurs under compulsory counterclaim rules.

Put in Gregg's "contact" terminology, if he defends upon the merits he has created an additional relationship with the forum jurisdiction; he is present in the forum court to litigate the factual and legal issues upon which a claim turns. This is sufficient contact to permit the court to adjudicate that very claim once and for all.[50] The scant

49. (Cont'd.)
whether quasi-in-rem jurisdiction should be permitted rather than to the question of choosing between a general and limited appearance rule. Note, 48 Iowa L. Rev. 441, 448 (1963). It is, of course, true that a general appearance rule will require the defendant to put more "at risk" in the forum jurisdiction if he wishes to litigate on the merits. This, however, is not a burden, in any realistic sense, except insofar as it relates to considerations of litigation convenience. The question is not one of "risk" but one of where and when the parties' rights will be determined. Defendant is "at risk" to the full extent of plaintiff's claim wherever he may be found. A general appearance rule deprives the defendant only of the opportunity to litigate twice, once in the forum state and once later in a jurisdiction where he may be served.

50. Where the claim sought to be adjudicated is sufficiently related to a single act of the defendant either within the forum state or causing an effect there, that isolated act will support *in personam* jurisdiction under the "minimum contacts" theory even though there has been no personal service within the jurisdiction. McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957); Duple Motor Bodies, Ltd. v. Hollingsworth, 417 F. 2d 231 (9th Cir. 1969); Bean v. Linden Crane Co., 326 F. Supp. 995 (E. D. Pa. 1971). Cf. Hess v. Pawloski, 274 U. S. 352, 47 S. Ct. 632, 71 L. Ed. 1091 (1927). While the "relationship" under these contacts theory cases is of a different sort than the relationship created by defendant's defense on the merits, the rationale underlying the contacts theory is nevertheless applicable. The relevant question is whether balancing the state

judicial authority on the question supports this conclusion.[51] The Restatement of Judgments and Professors Moore and Blume have reached similar conclusions.[52]

In short, weighing the public interest and the burden imposed upon the defendant, I conclude that a general appearance requirement does not violate due process.

The rule of Sands v. Lefcourt Realty Corp. is constitutional. It will be applied with respect to all claims in this action. While the defendant may file a limited appearance if he deems it necessary to preserve any appellate rights he may have, in that event any judgment awarded to plaintiff will, nevertheless, be an *in personam* one.

50. (Cont'd.)
interests sought to be protected against the burden placed upon the defendant, it "offends traditional notions of fair play and substantial justice", International Shoe Co. v. Washington, 326 U. S. 310, 316, 66 S. Ct. 154, 158, 90 L. Ed. 95 (1945), to require a defendant to litigate a claim in the forum state. McGee v. International Life Ins. Co., 355 U. S. 220, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957).

51. United States v. Balanovski, 236 F. 2d 298 (2nd Cir. 1956) (per Clark, C. J.); Grant v. Kellogg Co., 3 F. R. D. 229 (S. D. N. Y. 1943); Bede Steam Shipping Co. v. New York Trust Co., 54 F. 2d 658 (S. D. N. Y. 1931); Campbell v. Murdock, 90 F. Supp. 297 (N. D. Ohio 1950). Dewey v. Des Moines, 173 U. S. 193, 19 S. Ct. 379, 43 L. Ed. 665 (1899), relied upon most heavily by defendant, is not in point. That case dealt with jurisdiction to litigate. While the court did there treat an assessment on real property as being "in the nature of a judgment," this aspect of the case does not support defendant's position here. The assessment purported to impose personal liability upon a non-resident landowner. At the time of the assessment the non-resident had not been notified and his only contact with the state was his ownership of property. The court declared the personal liability portion of the assessment to be unconstitutional. This holding would be relevant in this case only if Gregg defaulted and this Court purported to enter an *in personam* judgment.

52. Restatement of Judgments § 40 Comment (a) (1942); 2A Moore, Federal Practice ¶ 12.13 n. 16 (1972); Blume, Actions Quasi in Rem Under Section 1655, Title 28 U. S. C., 50 Mich. L. Rev. 1 (1951). But see, Developments in the Law—Jurisdiction, 73 Harv. L. Rev. 909, 953 (1960).

APPENDIX D.

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MEMORANDUM OPINION AND ORDER

Wilmington, Delaware

April 24, 1975

STAPLETON, *District Judge:*

This matter is now before me on defendant's renewed motion to reconsider his motion to quash the sequestration of certain assets. Defendant's motion asserts that the Delaware sequestration statute, 10 Del. C. § 366, unconstitutionally denies due process of law to non-resident defendants. This Court has twice previously upheld these provisions in this case. *U. S. Industries v. Gregg,* 348 F. Supp. 1004 (D. Del. 1972); *U. S. Industries v. Gregg,* 58 F. R. D. 469 (D. Del. 1973). Defendant now asks me to reconsider these rulings in the light of two recently decided cases: *Garcia v. Krausse,* 380 F. Supp. 1254 (S. D. Tex. 1974), and *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* — U. S. —, 43 U. S. L. W. 4192 (Jan. 22, 1975). For the reasons which follow, I conclude that my previous rulings remain correct.

Garcia v. Krausse, supra, held Texas' sequestration statutes unconstitutional on the authority of *Fuentes v. Shevin,* 407 U. S. 67 (1972), and *Mitchell v. W. T. Grant Co.,* 416 U. S. 600 (1974). I have already analyzed the Delaware sequestration statute under the principles of *Fuentes,* see 348 F. Supp., at 1020-1023; *Mitchell,* if anything, loosened the strictures of the Due Process Clause as applied to the states in this context. See 416 U. S., at 634-635 (Stewart, J., dissenting); 623 (Powell, J., concurring). *North Georgia Finishing, Inc. v. Di-Chem, Inc., supra,* "appears to resuscitate *Fuentes v. Shevin,*" — U. S. —, 43 U. S. L. W., at 4194 (Powell, J., concurring), but it does not appear to go beyond that case in any respect. Accordingly, I see no necessity to focus again upon the reasoning of these cases.* The motion will be denied.

* In view of the emphasis in the *Mitchell* and *Di-Chem* cases on the need for a prompt hearing on the matter of possession *pendente lite,* see 416 U. S., at 610, 618; — U. S. —, 43 U. S. L. W., at 4194, 4195, it bears noting here that the Delaware statute and rules do permit a defendant whose property is seized to obtain a speedy judicial determination of the propriety of the sequestration. By moving to quash the sequestration under Chancery Rule 12(b)(1) to (5) or (7), the defendant may make what is in effect a special appearance limited to this issue, and receive plenary judicial consideration. See *Schwartz v. Miner,* 136 A. 2d 599 (Del. Ch. 1957); *Sands v. Lefcourt Realty Corp.,* 117 A. 2d 365 (Del. Sup. Ct. 1955). This procedure has been followed in this case, see *U. S. Industries v. Gregg,* 348 F. Supp. 1004, 1016-1020 (1972), and in many others, see, *e.g., Breech v. Hughes Tool Co.,* 189 A. 2d 428 (Del. Sup. Ct. 1963), *aff'g T. W. A. v. Hughes,* 185 A. 2d 762 (Del. Ch. 1962); *Gluck v. Chashin,* 210 A. 2d 805 (Del. Sup. Ct. 1965); *Nickson v. Filtrol Corp.,* 265 A. 2d 425 (Del. Ch. 1970); *Baker v. Gotz,* 336 F. Supp. 197 (D. Del. 1971), *aff'd,* 492 F. 2d 1238 (3rd Cir. 1974); *U. S. v. Sinclair,* 347 F. Supp. 1129 (D. Del. 1972); *D'Angelo v. Petroleos Mexicanos,* 373 F. Supp. 1076 (D. Del. 1974).

The defendant cannot, however, challenge the legal sufficiency of the complaint under Rule 12(b)(6) without entering a general appearance. *Hughes v. T. W. A.,* 185 A. 2d 886 (Del. Sup. Ct. 1962); *Widder v. Leeds,* 317 A. 2d 32 (Del. Ch. 1974). I have already held this requirement constitutional. *U. S. Industries v.*

ORDER

THIS 24th day of April, 1975, for the reasons appearing above, defendant's renewed motion for reconsideration of his motion to quash the sequestration in this case is denied.

WALTER K. STAPLETON,
United States District Judge.

• (Cont'd.)

Gregg, 58 F. R. D., at 478-481. Nor can the defendant, without appearing generally, move under the sequestration statute for the release of his property on the grounds that there is no "reasonable probability that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured." 10 Del. C. § 366(a). If this were a case like *Fuentes*, *Mitchell*, or *Di-Chem*, where the only reason for the seizure was to assure the availability of assets for the satisfaction of a potential judgment, I might well question whether it would be constitutionally permissible to deprive the defendant of a hearing on this issue prior to his appearance in the case—a hearing which would go to the heart of "probable cause to believe there is a need to continue the [sequestration] for a sufficient period of time to allow proof and satisfaction of the alleged debt," *Di-Chem, supra*, — U. S., at —, 43 U. S. L. W., at 4195 (Powell, J., concurring); and see majority opinion, at —, 43 U. S. L. W., at 4194. But the Delaware sequestration statute is applicable only in the case of non-resident defendants, and its purpose is not merely to secure the property, but also to furnish the basis for the State's *quasi-in-rem* jurisdiction, see *Breech v. Hughes Tool Co., supra; U. S. Industries v. Gregg*, 348 F. Supp. 1004, 1020, which would be lost, absent a general appearance by the defendant, if the property were released. See *Schwartz v. Miner, supra; Di-Chem, supra*, — U. S., at — n. 1, 43 U. S. L. W., at 4195 n. 1 (Powell, J., concurring). Since this provides an independent justification for the sequestration not based on any facts peculiar to an individual defendant, the provision of a hearing on the necessity for sequestration would protect no "substantial rights," *Mitchell v. W. T. Grant Co., supra*, 416 U. S., at 610, quoting *NLRB v. Mackay Co.*, 304 U. S. 333, 351 (1938), and is, therefore, not constitutionally required.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-2177

U.S. INDUSTRIES, INC., a corporation, and DIVERSACON INDUSTRIES, INC., a corporation

v.

F. BROWNE GREGG,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

(D.C. Civil No. 4431)

Argued April 20, 1976

Before: ALDISERT, KALODNER and WEIS, *Circuit Judges.*

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OPINION OF THE COURT

(Filed July 19, 1976)

ALDISERT, *Circuit Judge.*

Unlike 49 other states that enacted the Uniform Commercial Code, Delaware did not enact § 8-317(1) [1] which requires the actual seizure of stock certificates to effect a valid attachment or levy upon an interest in corporate stock. Rather, Delaware continued in force § 169 [2] of its General Corporation Law which provides that the situs of ownership of stock in a Delaware corporation is Delaware

1. § *8-317. Attachment or Levy Upon Security*

(1) No attachment or levy upon a security or any share or other interest evidenced thereby which is outstanding shall be valid until the security is actually seized by the officer making the attachment or levy but a security which has been surrendered to the issuer may be attached or levied upon at the source.

2. *8 Del. C. § 169. Situs of ownership of stock.*

For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State. (8 Del. C. 1953, § 169; 56 Del. Laws, c. 50.)

—regardless of the actual location of the stock certificates. In contrast to the Uniform Commercial Code procedure, Delaware nonresident sequestration [3] practice permits the "seizure" of a defendant's stock interest in a domestic corporation merely by giving notice to the corporation in Delaware. Seizure having been effected, Delaware case law establishes that the defendant may not appear specially to protect the seized property without subjecting himself to full *in personam* liability. *Sands v. Lefcourt Realty Corp.*, 35 Del. Ch. 340, 117 A.2d 365 (1955). The major question presented in this appeal from a default judgment approving the sale of defendant's interest in the shares of a Delaware corporation is whether the Delaware situs statute, as construed by the Delaware courts and as applied in this

3. *10 Del. C. § 366. Compelling appearance of nonresident defendant.*

(a) If it appears in any complaint filed in the court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the

sequestration proceeding, comports with the constitutional requirement that jurisdiction be predicated on minimum contacts with the forum. *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). In our view, it does not so comport. Accordingly, we reverse and remand with a direction to dismiss for want of jurisdiction over the person.

I.

The issue is sharply drawn in this litigation initiated by U.S. Industries, Inc. (USI), a Delaware corporation having its principal place of business in New York, and its wholly-owned subsidiary, Diversacon Industries, Inc., a Florida corporation having its principal place of business in Florida. The sole defendant is F. Browne Gregg, a Florida citizen and resident. In 1969 Gregg and USI entered into an agreement in Florida for the sale of three Florida construction companies controlled by Gregg. In essence, USI agreed to exchange USI voting common and special preference stock for the outstanding stock of the Gregg companies, the business of those companies to be transferred to USI's subsidiary, Diversacon. In addition to transferring the stock and business of his corporations, Gregg contributed $1 million to the capital of the transferred corporations and, with his wife, gave a $500,000

3. (Cont'd.)
release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give approved security to abide any order of the Court respecting the property.

(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law. (Code 1852, § 1938; 17 Del. Laws, c. 215; Code 1915, § 3850; 34 Del. Laws, c. 216, § 2; 35 Del. Laws, c. 217; 36 Del. Laws, c. 268, § 1; Code 1935, § 4374; 10 Del. C. 1953, § 366; 50 Del. Laws, c. 379, § 1.)

installment note to Diversacon. In return, Gregg received 100,962 shares of USI common stock and 8,750 shares of USI special preference stock; he was to receive additional common stock if Diversacon achieved specified levels of profitability in the future. Gregg also received an employment contract to serve as president of the transferred businesses until 1973. Gregg was removed as president in 1971 following disagreements about the operations and profitability of the acquired companies. In 1972, USI (and Diversacon as a nominal plaintiff) filed an eight-count complaint against Gregg in Delaware Chancery Court claiming damages in excess of $20 million in connection with the sale.

To obtain jurisdiction over Gregg, a nonresident, plaintiffs moved *ex parte* for an order of sequestration under 10 Del. C. § 366 to seize Gregg's property in Delaware. His only property in Delaware consisted of the USI shares he had obtained in exchange for his Florida businesses. Though physically the certificates were in the First National Bank of Leesburg, Florida, where Gregg had pledged them as security for a loan, appellee contends the shares were property in Delaware because of USI's Delaware incorporation and the situs rule of 8 Del. C. § 169. Plaintiffs filed a bond in the sum of $1,000 and the state court issued the order of sequestration, the sequestrator seizing the shares by formally notifying USI of the order. The First National Bank of Leesburg then moved to intervene and quash the sequestration claiming that it owned the whole of the interest in the shares by virtue of the pledge and that Gregg had no interest to sequester. At this point, and before further action by the Delaware court, Gregg removed the case to federal court based upon diversity and $10,000 in controversy.

The proceedings in the district court were not cursory: Gregg removed the action in July, 1972, and final judgment was ordered in August, 1975. For present purposes, however, we need not trace the intricate history of the litiga-

tion below.[4] Gregg raised objections to the sequestration which were rejected, and he sought interlocutory review which was denied. Knowing he would be subject to *in personam* liability if he answered the complaint, *Sands v. Lefcourt Realty Corp., supra,* Gregg did not answer. Issues concerning damages, valuation of the stock, and the prior lien of the bank were resolved. Eventually, Gregg's stock was sold in satisfaction of the *quasi in rem* judgment of default entered against him. He appeals from the default judgment, raising four issues:

1. Whether a nonresident defendant has a sequesterable interest in Delaware corporate stock where the negotiable stock certificates have been pledged and delivered by him to a bank located outside Delaware and the defendant holds only a contingent right to the return of the certificates if and when the loan is paid in full?

2. Whether the seizure of Gregg's stock to compel his personal appearance to answer damage claims unrelated to Delaware and unrelated to his rights in the stock deprived him of due process because of the absence of minimum contacts with Delaware to sustain jurisdiction? *Hanson v. Denckla,* 357 U.S. 235 (1958); *International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

3. Whether the Delaware procedure for seizure of Gregg's stock without a pre-seizure adversary hearing deprived him of due process and equal protection rights? *North Georgia Finishing, Inc. v. Di-Chem, Inc.,* 419 U.S. 601 (1975); *Mitchell v. W. T. Grant Co.,* 416 U.S. 600 (1974); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

4. Whether the denial of an opportunity to make a limited appearance, defending plaintiff's claim on the merits with any judgment limited to the value of the seized property, deprived Gregg of due process?

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4. Decisions of the district court are reported at 348 F. Supp. 1004 (D. Del. 1972) and 58 F.R.D. 469 (D. Del. 1973).

II.

We turn first to the non-constitutional argument. The district court found, and we agree:

> The sequestration order was served upon USI on or about June 19, 1972. The stock was then registered in the name of Gregg. As of July 27, 1972, the collateral was valued by the Bank at $2,066,333.62.
>
> The loan transaction was negotiated and closed in Florida. The law of Florida determines the nature and extent of Gregg's interest, if any, in the stock. The law of Delaware controls the question of whether any such interest may be sequestered under 10 Del. C. § 366. Cheff v. Athlone Industries, Inc., 233 A.2d 170 (Del. Sup. Ct. 1967); Nickson v. Filtrol Corporation, 265 A.2d 425 (Del. Ch. 1970).
>
> An examination of Florida law reveals that Gregg had not transferred his entire interest in the stock to the Bank at the time of sequestration. The rights retained under Article 9 of Florida's Uniform Commercial Code by a debtor who has conveyed a security interest in collateral apply "whether title to collateral is in the secured party or in the debtor." 19C Fla. Stat. Ann. § 679.9-202 (West 1966). These rights include the right of return of the collateral upon fulfillment of the debtor's obligations. *Id.* § 679.9-506. This right is expressly recognized in the Gregg note; it is, in any event, unwaivable. *Id.* § 679.9-501.
>
> The rights reserved to the debtor under Article 9 are rights in the collateral itself and may be transferred voluntarily or involuntarily. *Id.* § 679.9-311 provides:
>
> > "The debtor's rights in collateral may be voluntarily or involuntarily transferred (by way of sale, creation of a security interest, attachment, levy, garnishment or other judicial process) notwithstanding a provision in the security agreement

> prohibiting any transfer or making the transfer constitute a default."

348 F. Supp. 1004, 1016 (D. Del. 1972) (footnote omitted).

Having decided that Florida law determines the nature of Gregg's interest in the securities pledged to the bank, and having decided further that under Florida law Gregg had not transferred his entire interest in the stock at the time of the sequestration, the question is whether Delaware law would permit the sequestration of Gregg's interest. The district court found that Delaware law would so permit. We agree.

Our starting point is 10 Del. C. § 366 which provides that the "Court may compel the appearance of the defendant by the seizure of all or any part of his property." The word "property" has been construed by Delaware courts as having a "broad and comprehensive meaning, including legal and equitable interests in both real and personal property." *Blumenthal v. Blumenthal,* 28 Del. Ch. 1, 35 A.2d 831, 836 (Ch. 1944), *aff'd* 28 Del. Ch. 448, 59 A.2d 216 (Sup. Ct. 1945); *Sands v. Lefcourt Realty Corp., supra.* That an interest is contingent does not make it non-sequesterable. *Weinress v. Bland,* 31 Del. Ch. 269, 71 A.2d 59 (Ch. 1950).

The district court concluded that the bank merely had a security interest in Gregg's USI stock—valued at over $2 million at the time of seizure—securing a demand note of $1.5 million. Gregg had at least two identifiable interests in the pledged stock: (a) an equitable interest in the amount by which the stock value exceeded the debt, and (b) an absolute right to discharge the bank's lien upon payment of the debt.

We agree with the district court's summary:

> . . . Delaware courts, confronted with questions of whether interests in stock were sequesterable, have asked whether the specified interest was cognizable at law or equity, whether it was susceptible of sufficient identification to permit seizure, and whether it was saleable. Blumenthal v. Blumenthal, *supra;* Greene v. Johnston, 34 Del. Ch. 115, 99 A.2d 627 (Sup. Ct. 1953). Here Gregg's interest is so cognizable, so identifiable and so alienable. Accordingly, I conclude that it is sequesterable.

348 F. Supp. at 1017.

The Delaware cases urged upon us by Gregg do not fault the reasoning of the district court nor dilute the soundness of its conclusion. Four of these were cases where an effort was made to seize property held by a legal entity in which the defendant had some interest. *Winitz v. Kline,* 288 A.2d 456 (Del. Ch. 1971) (voting trust); *Nickson v. Filtrol Corp.,* 265 A.2d 425 (Del. Ch. 1970) (trust); *Cheff v. Athlone Industries, Inc.,* 233 A.2d 170 (Del. Sup. Ct. 1967) (estate); *Buechner v. Farbenfabriken Bayer Aktiengesellschaft,* 38 Del. Ch. 490, 154 A.2d 684 (Sup. Ct. 1959) (subsidiary corporation). Seizure was denied in all cases, the Delaware courts having regard for the separate existence of the legal entity and the rights of its creditors and beneficiaries not involved in the litigation. The fifth case, *K-M Auto Supply, Inc. v. Reno,* 236 A.2d 706 (Del. Sup. Ct. 1967) involved an attempt to attach a client's funds held by an attorney in escrow for a third party, and attachment was vacated on the ground that the client-defendant no longer had an attachable interest. We see only the most remote factual parallels between these cases and the case *sub judice,* and we perceive fundamental legal distinctions. Having in mind particularly that the interest of the third-party bank here was fully protected, we discern no reason why these cases require the conclusion that Gregg had no sequesterable interest.

We are satisfied that under Florida law Gregg had not relinquished his entire interest in the shares and that under Delaware law he possessed sequesterable "property" within the meaning of § 366.

III.

We turn now to the first of Gregg's constitutional arguments: that there are no minimum contacts with Delaware upon which to predicate jurisdiction in that state. USI and Diversacon have no contacts with Delaware except for USI's incorporation in the state. The transactions giving rise to the litigation did not take place in Delaware. Gregg is not a Delaware resident, he conducts no business in that state, and he owns no property physically located there. His only contact arises by virtue of the provision of 8 Del. C. § 169 that the situs of his USI shares is Delaware. This is the *sole* nexus upon which Delaware can predicate its jurisdiction to adjudicate Gregg's rights and this, Gregg argues, is too fragile a connection to satisfy constitutional requirements.

Gregg relies upon the Supreme Court's classic formulations of the constitutional limits to state court jurisdiction.

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Milliken v. Meyer*, 311 U.S. 457, 463.
>
> . . .
>
> Whether due process is satisfied must depend . . . upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations.

International Shoe Co. v. Washington, 326 U.S. 310, 316, 319 (1945).

> [Restrictions on the personal jurisdiction of state courts] are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the "minimal contacts" with that State that are a prerequisite to its exercise of power over him.

Hanson v. Denckla, 357 U.S. 235, 251 (1951).

To resolve the jurisdictional question presented, we must determine (a) whether the constitutional strictures of *International Shoe* and its progeny apply to jurisdiction denominated *quasi in rem* and (b) if they do, whether the statutory situs of 8 Del. C. § 169, alone, is a sufficient minimum contact to support the jurisdiction here exercised.

A.

The Delaware Supreme Court recently had occasion to consider the problem in *Greyhound Corp. v. Heitner*, — A.2d — (Del. Sup. Ct. No. 132, April 15, 1976), *appeal filed sub nom. Shaffer v. Heitner*, 44 U.S.L.W. 3739 (June 22, 1976) (No. 75-1812). In upholding the constitutionality of the Delaware sequestration procedure, the Delaware Supreme Court swiftly disposed of the contention that minimum contacts were lacking where jurisdiction was based on the statutory situs rule of § 169:

> There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company*, Del. Supr., 189 A.2d 428 (1963), and rejected by this Court. Compare *Hibou, Inc. v. Ramsing*, Del. Super., 324 A.2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction

under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 *Del. C.* § 169 the "situs of the ownership of the capital stock of all corporations existing under the laws of this State . . . [is] in this State", and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York*, 288 U.S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Copper Min. Co.*, 177 U.S. 1, 20 S. Ct. 559 (1900), it has done so and the presence thereof provides the foundation for § 366 in this case. Cf. *Breech v. Hughes Tool Company* supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U.S. Industries, Inc. v. Gregg*, D. Del., 348 F. Supp. 1004 (1972).

Slip Opinion at 7-8 (footnote omitted).

Concerning a possible constitutional problem in the application of § 169 to shareholders whose certificates are located outside of Delaware, the Delaware Supreme Court was similarly curt in its rejection of the argument:

Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 *Del. C.* § 169 to reserve the situs of shares here is "to indulge in a fiction."

The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of New York* supra; *Jellenik v. Huron Copper Min. Co.* supra; *U.S. Industries, Inc. v. Gregg* supra; compare *Breech v. Hughes Tool Company* supra, and, for present purposes that is conclusive on this contention.

Slip Opinion at 23-24.

Because the Delaware Supreme Court accepted the rationale and conclusion of the district court, we set forth the district court's four-paragraph treatment of this subject *in toto:*

Gregg's first argument is based upon International Shoe v. Washington, 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945) and its progeny. He asserts that "under modern concepts of due process, a court cannot assert jurisdiction unless either the defendant or the subject matter of the action had at least minimal contacts with the forum."

The "minimal contacts" doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court. While a contrary view has been urged as the wiser one,[17] the courts have accepted the view of Justice Holmes that the "foundation of jurisdiction is physical power".[18] Just as a court may exercise *in personam* jurisdiction in a suit on a transitory cause of action where the only contact with the forum state is personal service upon the defendant within that

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[17.] See e.g., Ehrenzweig, The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Non Conveniens, 65 Yale L. Rev. 289 (1956); Carrington, The Modern Utility of Quasi In Rem Jurisdiction, 76 Harv. L. Rev. 303 (1962). These commentators, however, recognize the prevailing view.

[18.] McDonald v. Mabee, 243 U.S. 90, 91, 37 S. Ct. 343, 61 L. Ed. 608 (1915). See also Goodrich, Conflicts of Law, § 73 (1965).

state,[19] so also may a court exercise jurisdiction over property within its control regardless of the presence or absence of other contacts with the forum state.[20] Where the court has either of these foundations for the exercise of its power, it may constitutionally proceed, though the absence of substantial contacts with the forum may lead it to decline to do so under the familiar principles underlying the doctrine of *forum non conveniens* [21] and the federal transfer provisions of 28 U.S.C. § 1404.

The state of a corporation's domicile may constitutionally provide, as Delaware has done, that the situs of its capital stock is in its home state.[22] Thus, where the stock of a domestic corporation is brought before the court, this provides a sufficient basis for the exercise of its *quasi in rem* jurisdiction even though the defendant may be a non-resident who has had no prior contacts with the forum state. Breech v. Hughes Tool Co., 41 Del. Ch. 128, 189 A.2d 428 (Del. Sup. Ct. 1963);

[19.] E.g., Fauntleroy v. Lum, 210 U.S. 230, 28 S. Ct. 641, 52 L. Ed. 1039 (1908); Restatement, Conflicts of Laws, §§ 77, 78; Goodrich, Conflict of Laws, § 73 (1964).

[20.] *Cf.* Hanson v. Denckla, 357 U.S. 235, 246, 78 S. Ct. 1228, 2 L. Ed.2d 1283 (1957); Beal, Conflicts of Laws, §§ 106.3, 107.3 (1935); Goodrich, Conflicts of Law, § 70 (4th Ed. Scoles 1964).

[21.] E.g., Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S. Ct. 839, 91 L. Ed. 1055 (1947); General Foods Corp. v. CryoMaid, Inc., 41 Del. Ch. 474, 198 A.2d 681 (Del. Sup. Ct. 1964). The cases relied upon by Gregg arise because of the difficulty of applying traditional concepts of *in personam* jurisdiction over individuals in suits against foreign corporations. Even in such cases if the corporation's activities in a state are substantial enough it is ordinarily subject to suit there on causes of action unrelated to the business conducted in the forum state. See e.g., Restatement (Second) Conflict of Laws, § 47 (1971).

[22.] Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S. Ct. 295, 77 L. Ed. 652 (1932); Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 20 S. Ct. 559, 44 L. Ed. 647 (1899).

Ownbey v. Morgan, 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1920).[23]

Gregg attempts to distinguish the relevant authorities by saying that this is not in reality a *quasi in rem* action. He correctly points out that an avowed purpose of Delaware's sequestration statute is to compel a general appearance and thereby produce a basis for *in personam* jurisdiction. While the statute is concededly designed to produce this result, it does not follow that the action is not one governed by the rules applicable to *quasi in rem* jurisdiction. Unless and until the non-resident defendant elects to enter a general appearance, the power of the court is limited to the application of the property before the court to the plaintiffs' claim.[24]

[23.] [Incorporates note 26:]
Although neither the Delaware court nor the United States Supreme Court considered it significant, the *Ownbey* case appears to have been a suit by non-resident plaintiffs against a non-resident defendant arising out of the latter's activities as general manager of a Delaware corporation the activities of which were limited to the States of Colorado and New Mexico. Morgan v. Ownbey, 29 Del. 379, 6 Boyce 379, 100 A. 411 (1916).

[24.] 10 Del. C. § 366; Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed.2d 1283 (1958); *cf.* Jacobs v. Tenney, 316 F. Supp. 151 (D. Del. 1970); Restatement of Judgments, § 34 comment f (1942).

348 F. Supp. 1004, 1019-20 (D. Del. 1972).

We are persuaded that the cryptic conclusions of the Delaware Supreme Court and the district court cannot survive detailed critical analysis.

B.

The Delaware Supreme Court and the district court relied on four cases: *Rogers v. Guaranty Trust Co.*, 288 U.S. 123 (1932); *Ownbey v. Morgan*, 256 U.S. 94 (1921); *Jellenik v. Huron Copper Mining Co.*, 177 U.S. 1 (1899); *Breech v. Hughes Tool Co.*, 189 A.2d 428 (Del. Sup. Ct.

1963). For reasons we will explain, we believe that reliance on these cases was misplaced.

As a preliminary matter, the three Supreme Court cases relied on to dispose of the *International Shoe* contentions were all decided before *International Shoe*. Their precedential vitality, therefore, to rebut a minimum contacts argument would seem dubious at best. But our uneasiness with these precedents goes further. *Jellenik* was not a constitutional law case at all; it involved only the construction of a federal statute which allowed a federal trial court to bring before it absent, nonresident defendants in an action to remove encumbrances upon title to personal property "within the district where such suit is brought". Justice Harlan wrote that the "question to be determined on this appeal is, whether the stock in question is personal property within the district in which the suit was brought." And he answered the question as follows:

> Whether the stock is in Michigan so as to authorize that state to subject it to taxation as against individual shareholders domiciled in another state is a question not presented in this cause, and we express no opinion upon it. But we are of opinion that it is within Michigan for the purposes of a suit brought there against the company—such shareholders being made parties to the suit—to determine whether the stock is rightfully held by them. The certificates are only evidence of the ownership of the shares, and the interest represented by the shares is held by the company for the benefit of the true owner. As the habitation or domicile of the company is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is, whenever it is sought by suit to determine who is its real owner.

177 U.S. at 13. Clearly, the opinion was carefully directed to the narrow statutory issue presented—whether the stock was within the district for purposes of a pure *in rem* action to determine ownership—and did not pretend to adjudicate constitutional questions or announce a constitutional rule.

Similarly, *Rogers v. Guaranty Trust Co.* was not a constitutional law case. *Rogers* was an action brought in New York state court seeking cancellation of certain shares in a New Jersey corporation authorized to and doing business in New York as well as in New Jersey. No question of constitutional limits to jurisdiction was adjudicated. The Court made clear that *both* states were in a position to exercise jurisdiction, but directed the New York federal court to decline to exercise jurisdiction on the basis of the discretionary "settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile." 288 U.S. at 130.

Finding no constitutional dimension to *Jellenik* or *Rogers,* we must disapprove reliance upon them as authority for rejecting the constitutional challenge here presented. The use of these cases as constitutional authorities is a classic example of illicit precedential inbreeding. The illegitimate conception apparently took place in *Breech v. Hughes Tool Co.*—the keystone of the *Greyhound* opinion on this issue. At issue in *Breech,* as here, was a federal constitutional challenge to the Delaware stock seizure practice. As here, plaintiff argued that there were no minimum contacts to justify *quasi in rem* jurisdiction. The Delaware Supreme Court met the argument thus: "This argument is interesting, but is clearly unsound under settled principles of law." 189 A.2d at 431. The settled principles of law consisted of the Delaware statutes, *Jellenik* and *Rogers.* The court's entire discus-

sion on this issue is set forth in the margin.[5] The inbreeding continued in the district court, reliance being had on the precedent of *Breech* as well as *Jellenik* and *Rogers.*

5. *Second.* Breech raises a constitutional question. He argues in effect that his Ford Motor Company stock has no situs in Delaware justifying the seizure. Since it is intangible property, it has a situs only by legal fiction; therefore the selection of a situs for intangibles must be one that embodies a "common sense appraisal of the requirements of justice and convenience in particular conditions." Per Cardozo, J., in Severnoe Securities Corp. v. London & Lancashire Ins. Co., 255 N.Y. 120, 123-124, 174 N.E. 299, 300. Breech analogizes this test to the federal test respecting the subjection of a foreign corporation to the jurisdiction of a state, i.e. a test based on "minimum contacts" with the state of the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 66 S. Ct. 154, 158, 90 L. Ed. 95.

Breech insists that if such a test be applied here, Delaware has no jurisdiction to seize his stock. There are no sufficient "contacts", he says, between the seized shares and the claim asserted by Toolco to justify *quasi in rem* jurisdiction. Hence the seizure should be vacated.

This argument is interesting, but is clearly unsound under settled principles of law. The seized shares have a Delaware situs because the Ford Motor Company is a Delaware corporation and the corporation law to which it owes its existence provides expressly that the situs of ownership of stock of all such corporations, for "all purposes of title, action, attachment, garnishment and jurisdiction of all courts in this State" shall be regarded as in this State. 8 Del. C. § 169.

In Jellenik v. Huron Copper Mining Co., 177 U.S. 1, 20 S. Ct. 559, 44 L. Ed. 647, the Supreme Court of the United States upheld the right of the State of Michigan to determine ownership of shares of stock of a Michigan corporation. The court quoted the provisions of the Michigan statute, including provisions for attachment of the stock, and said:

> "The authority of the state to establish such regulations in reference to the stock of a corporation organized and existing under its laws cannot be doubted." 20 S. Ct. 563.

And see Rogers v. Guaranty Trust Co., 288 U.S. 123, 53 S. Ct. 295, 298, 77 L. Ed. 652.

The attachment of stock of Delaware corporations, without seizure of the certificate representing the shares, upon the theory that the stock has a statutory situs here, has existed since at

Finally, in *Greyhound,* the Delaware Supreme Court was in a position to state that it was "not persuaded that *Breech* should be abandoned," citing a line of cases: *Jellenik, Rogers,* and the district court opinion in this action. We cannot accept the notion that the mere proliferation of unwarranted reliances on old cases suffices to settle a contemporary issue in a dynamic field of law.

C.

Like *Jellenik, Rogers,* and *Breech, Ownbey v. Morgan,* the fourth case, does not dictate the outcome of this litigation. *Ownbey,* however, deserves separate consideration. Challenged in *Ownbey,* and sustained by the Supreme Court, was a former Delaware statutory requirement that a defendant put up a "special bail" in a foreign attachment suit in order to be allowed to appear and defend on the merits. Ownbey was unable to put up the bail and a default judgment was entered against him. The *Ownbey* Court apparently rested its decision on a theory of implied consent as well as on the historical and customary validity of the practice in issue.

5. (Cont'd.)

least 1852 (Code, § 1253). The "situs" section cited above (§ 169), stems from the corporation law of 1899. 21 Del. L. c. 273, § 128. These statutes thus embody a settled Delaware policy, and the court may not overturn it on the basis of a suggested federal rule that has never been announced.

The weakness of Breech's contention is exposed by his concession that the attachment of Hughes' stock in "Toolco" was legal "because of the intimate relationship between the stock and cause of action alleged by plaintiff TWA." We have considerable difficulty in following this distinction. The primary purpose of the seizure is to compel appearance in a law suit, and to this purpose neither the nature of the property seized nor its incidental connection with the law suit seems material.

We are of opinion that the seizure was a constitutional exercise of power.

189 A.2d at 430-31.

> [A] property owner who absents himself from the territorial jurisdiction of a State, leaving his property within it, must be deemed *ex necessitate* to consent that the State may subject such property to judicial process to answer demands made against him in his absence, according to any practicable method that reasonably may be adopted. A procedure customarily employed, long before the Revolution, in the commercial metropolis of England, and generally adopted by the States as suited to their circumstances and needs, cannot be deemed inconsistent with due process of law, even if it be taken with its ancient incident of requiring security from a defendant who after seizure of his property comes within the jurisdiction and seeks to interpose a defense.

256 U.S. at 111.

We recognize that there is disagreement about the continued vitality of *Ownbey* as measured by contemporary standards. In relying on the historical validity of the practice, *Ownbey* ignored the fact that state procedures had no due process significance prior to the 1868 adoption of the Fourteenth Amendment. Moreover, the Supreme Court, more recently, has tartly reminded that "[t]he fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms." *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1960). Judge Gibbons has concluded that "[i]t is inconceivable that *Ownbey* would be decided today as it was decided in 1921." *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123, 1136 (3d Cir. 1976).

It is contended, however, that *Ownbey* survives with full vigor because it has been recently cited by the Supreme Court. The contention merits analysis. In *Fuentes v. Shevin*, 407 U.S. 67, 91 (1972), the Supreme Court cited *Ownbey* to support this statement:

> Only in a few limited situations has this Court allowed outright seizure [23] without opportunity for a prior hearing.

[23] Of course, outright seizure of property is not the only kind of deprivation that must be preceded by a prior hearing. See, *e.g., Sniadach v. Family Finance Corp., supra.* In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Bros. & Co. v. Bennett*, 277 U.S. 29. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U.S. 94. It is much less clear what interests were involved in the third case, decided with an unexplicated *per curiam* opinion simply citing *Coffin Bros.* and *Ownbey*. *McKay v. McInnes*, 279 U.S. 820. As far as essential procedural due process doctrine goes, *McKay* cannot stand for any more than was established in the *Coffin Bros.* and *Ownbey* cases on which it relied completely. See *Sniadach v. Family Finance Corp., supra*, at 340; *id.*, at 344 (Harlan, J., concurring).

Two years later, *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 613-14 (1972), mentioned *Ownbey* in the context of determining whether the petitioner in the case was entitled to a hearing before seizure. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 n.13 (1974), cited *Ownbey* in a discussion of considerations that justify postponement of notice and hearing until after seizure. Similarly, in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 610 (1975), *Ownbey* was cited as an instance where the Court had "approved prejudgment attachment liens."

Our review of these cases convinces us that, at the most, *Ownbey* has been cited by the Supreme Court from 1972 to 1975 to illustrate the few limited situations in which the Court historically has permitted seizure of property without opportunity for a prior hearing. Whether the case retains vitality for more than that seems here a moot issue. The brute fact is that *Ownbey* adjudicated the constitutionality of a statutory procedure since abandoned. While the case, incidentally, did involve the seizure of stock, it

did not adjudicate the question of *situs;* and certainly it did not anticipate the minimum contacts doctrine of *International Shoe.*[6] *Ownbey* did, however, rely in part on the ancient distinction between actions *quasi in rem* and actions *in personam*—the distinction which formed the major premise of the Delaware Supreme Court's truncated analysis in *Greyhound Corp. v. Heitner, supra.* We turn now to an analysis of that distinction in the context of this case.

IV.

We begin our inquiry into the constitutional dimensions of *quasi in rem* jurisdiction by conceding that the minimum contacts language of *International Shoe* was expressly made applicable to the exercise of jurisdiction *in personam.* Subsequent cases, however, have made it clear that ancient labels do not control the content of constitutional guarantees. Referring to the distinction between *in rem, quasi in rem,* and *in personam* actions, *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 312 (1950), emphasized that "the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state." Later, *Hanson v. Denckla,* 357 U.S. 235, 246 (1958), articulated the constitutional requirement in terms of *af-*

6. In *Fuentes,* the Supreme Court mentioned *Ownbey* as involving an attachment "necessary to secure jurisdiction." It is worth remembering that *Ownbey* was decided before *International Shoe* stimulated the enactment of long arm statutes. When *Ownbey* was decided, attachment was often necessary to secure jurisdiction (*quasi in rem*) over a nonresident defendant; today, at least if there are minimum contacts, full *in personam* jurisdiction can usually be obtained under a long arm statute. Arguably, then, the need to secure jurisdiction that justified *Ownbey* is now fully met by long arm jurisdiction, and could no longer serve to support the harsh result in that case.

filiating circumstances[7] "without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interests in property (jurisdiction *in rem* or quasi in rem)."

Hanson involved, *inter alia,* an attempt by Florida to exercise jurisdiction over trust assets in Delaware based upon the fact that the settlor-decedent had established a Florida domicile after executing the trust. Having made clear in a footnote that it was using "*in rem*" in lieu of "*in rem* and *quasi in rem,*" 357 U.S. at 246 n.12, the Court had this to say generally about such jurisdiction:

> Founded on physical power, *McDonald v. Mabee,* 243 U.S. 90, 91, the *in rem* jurisdiction of a state court is limited by the extent of its power and by the coordinate authority of sister States. The basis of jurisdiction is the presence of the subject property within the territorial jurisdiction of the forum State. *Rose v. Himely,* 4 Cranch 241, 277; *Overby v. Gordon,* 177 U.S. 214, 221-222. Tangible property poses no problem for the application of this rule but the situs of intangibles is often a matter of controversy.

357 U.S. at 246-47 (footnote omitted). Finding it essential to scrutinize the affiliations that might justify Florida's exercise of jurisdiction, the Court concluded: "For the purpose of jurisdiction *in rem* the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. *Green v. Van Buskirk,* 7 Wall. 139, 150. The maxim is no less suspect when the domicile is that of a decedent. . . . The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction *in rem.*" 357 U.S. at 246.

7. Apparently the phrase was suggested by Professor E. R. Sunderland. See Sunderland, *The Problem of Jurisdiction,* 4 TEXAS L. REV. 429 (1936), reprinted in SELECTED ESSAYS ON CONSTITUTIONAL LAW, BOOK 3, 1270, 1272 (1938).

We can only understand *Mullane* and *Hanson* as establishing a constitutional limit to state court jurisdiction wholly independent of the label—*in rem, quasi in rem,* or *in personam*—that may be affixed to that jurisdiction. And whether it be called affiliating circumstances or minimum contacts,[8] we must assume that ultimately the test of *International Shoe* is determinative: that there be sufficient connection with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316.

Judge Gibbons calls the problem here the "bifurcation of *International Shoe's* jurisdictional doctrine." *Jonnet v. Dollar Savings Bank,* 530 F.2d 1123, 1132 (3d Cir. 1976). He has placed the matter in proper perspective, chronologically and jurisprudentially:

> The analytical point of departure for those cases which have sustained against jurisdictional challenge foreign attachment procedures has traditionally been a quartet of Supreme Court cases reviewing judgments of state courts: *Pennoyer v. Neff,* 95 U.S. 714, 24 L. Ed. 565 (1877); *Harris v. Balk,* 198 U.S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905); *Pennington v. Fourth National Bank,* 243 U.S. 269, 37 S. Ct. 282, 61 L. Ed. 713 (1917); *Ownbey v. Morgan,* 256 U.S. 94, 41 S. Ct. 433, 65 L. Ed. 837 (1921). See, e.g., *Steele v. G. D. Searle & Co.,* 483 F.2d 339 (5th Cir. 1973), *cert. denied,* 415 U.S. 958, 94 S. Ct. 1486, 39 L. Ed.2d 572 (1974). All of these cases were decided before the Supreme Court in *International Shoe* redefined the due process limitations upon the exercise of judicial power over disputes foreign to the forum. All were decided before the Supreme Court in the escheat cases recognized that there are due process limitations upon the power of a state which has permitted a corporation chartered by it to do business, issue securities and incur debts beyond its borders to insist upon the fiction of a local situs for its securities and debts. *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71, 82 S. Ct. 199, 7 L. Ed.2d 139 (1961); *Texas v. New Jersey,* 379 U.S. 674, 85 S. Ct. 674, 13 L. Ed.2d 596 (1964), 380 U.S. 518, 85 S. Ct. 1136, 14 L. Ed.2d 49 (1965). No Supreme Court case has actually considered the due process issues tendered by this appeal, since the constitutional interpretations which raise them had not yet been made at the time either *Pennoyer v. Neff* or *Ownbey v. Morgan* was decided.

8. In *Hanson,* the Supreme Court used the phrases interchangeably, evidently attributing the same constitutional content to both. See 357 U.S. at 250, 251.

530 F.2d at 1131-32. Judge Gibbons' analysis, a scholarly, carefully documented history of *quasi in rem* foreign attachment in the federal courts develops a thesis to which we perceive no effective rebuttal. "Although it can be argued," he concludes, "that the content of constitutional process due a litigant defending title to property will vary from that due a litigant defending himself from liability in personam, there is no reason to believe that the Supreme Court presently recognizes such a distinction. . . . In short, the same limitations of fundamental fairness apply to any exercise by the state of judicial powers, whether that exercise be denominated in rem, quasi in rem or in personam. One of those limitations . . . is the *International Shoe* rule." *Ibid.* at 1136-37. We agree.

Our conclusion that *International Shoe* applies to *quasi in rem* actions is contrary to the district court's statement that "[t]he 'minimal contacts' doctrine to which Gregg refers is not applicable where, as here, the plaintiff invokes the *quasi in rem* jurisdiction of the court." 348 F. Supp. at 1020. Our conclusion also severely erodes the foundation of the Delaware Supreme Court's truncated analysis in *Greyhound Corp.* that *International Shoe* did not apply because "jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of cap-

ital stock here." Slip Opinion at 7. Far from ending the constitutional inquiry, we believe that the *quasi in rem* character of the jurisdiction constitutes the analytical beginning point for the application of constitutional precepts to the case.

V.

We must decide whether the single fact of statutory situs of stock under 8 Del. C. § 169 suffices to give Delaware sufficient contact or affiliation with this litigation to satisfy constitutional standards. In our view, it does not.

We do not exaggerate in saying that § 169 is the single affiliation with Delaware in this case. The cause of action did not arise in Delaware. The defendant is not a citizen or resident of Delaware; he conducts no business in the state and owns no property physically located there. His sole contact is his interest in shares of USI represented by certificates located in Florida. The plaintiffs' connections with Delaware—insofar as that may be relevant [9]—are similarly sparse. Diversacon has no connection whatsoever: it is a Florida corporation having its principal place of business in Florida. USI is incorporated in Delaware but has its principal place of business in New York; it owns no property [10] and maintains no business establishments in Delaware other than a registered agent's office as required by statute.

9. It can plausibly be argued that a plaintiff's contacts with the forum are irrelevant for jurisdictional purposes. *Jonnet v. Dollar Savings Bank, supra,* 530 F.2d at 1141 (Gibbons, J., concurring). *Contra, Farrell v. Piedmont Aviation, Inc., infra.* We need not reach the issue, however, because here the plaintiffs' contacts with the forum are insufficient even assuming their relevance.

10. The absence of plaintiffs' assets in the state distinguishes this case from *Baker v. Gotz,* 492 F.2d 1238 (3d Cir. 1974) (in banc), *aff'g mem. by an equally divided court* 336 F. Supp. 197 (D. Del. 1971), *cert. denied,* 417 U.S. 955 (1974). In *Baker,* the plaintiff railroad corporation, although a Pennsylvania corporation, did business and had substantial assets in Delaware.

Because even the *plaintiffs* here cannot with reason be characterized as residents of Delaware, *Minichiello v. Rosenberg,* 410 F.2d 106 (2d Cir. 1968), *aff'd on rehearing in banc,* 410 F.2d 117, *cert. denied,* 396 U.S. 844 (1969), provides no precedential support for sustaining jurisdiction here. In *Minichiello,* the majority seemed to uphold the constitutionality of *Seider v. Roth,* 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), on the basis that the *Seider* procedure (a judicially created direct action against liability insurance carriers) would be available only for New York resident plaintiffs or plaintiffs injured in New York. The limitation to New York residents was affirmed in *Farrell v. Piedmont Aviation, Inc.,* 411 F.2d 812 (2d Cir.), *cert. denied,* 396 U.S. 840 (1969), Judge Friendly observing that "the constitutional doubt with respect to applying Seider v. Roth in favor of nonresidents would be exceedingly serious" and that the "doubt arises from New York's lack of meaningful contact with the claim." *Ibid.* at 817. In *Farrell,* the formality of appointing a New York administrator of a nonresident decedent's estate did not supply the necessary meaningful contact with New York. As in *Farrell,* it would seem that the plaintiffs' contacts with the forum here are more formal than meaningful, at least in constitutional terms.

Indeed, it is difficult to imagine how litigation implicating a Delaware corporation could have fewer or less meaningful contacts with the state. The brute fact is that USI's Delaware incorporation is the only genuine contact this litigation has with Delaware. It is our view that, under these circumstances, the fictional § 169 situs of stock in Delaware does not pass constitutional muster as a predicate for jurisdiction in an action admittedly seeking to obtain personal liability of a nonresident in connection with transactions unrelated to the forum.

Again, we are impressed by Judge Gibbons' analysis:

> As a metaphysical exercise it may be asserted that since the very existence of the corporations is de-

> pendent upon state law, state law should be regarded as supreme in defining the situs of intangibles resulting from such corporate existence. But the state has permitted the corporations to stray far from its boundaries, and to issue intangibles without its jurisdiction. New Jersey once contended that since it issued a corporation's charter, it could determine the situs of intangibles in an in rem proceeding. The Supreme Court rejected this contention in *Texas v. New Jersey, supra.* Justice Black's opinion recognized that a local contacts analysis suggested by *International Shoe* and *Mullane v. Central Hanover Bank & Trust Co.* would be unworkable in escheat cases, because more than one jurisdiction might have contacts minimally sufficient to support the exercise of adjudicatory authority over the dispute. Nevertheless, he rejected the fictionalized situs approach, announcing instead a rule favoring the state of the last known address of the creditor. There is no more justification for recognizing state notions of fictionalized situs of corporate intangibles in a *quasi-in-rem* case than in an escheat case. Indeed, the state's interest in a fictionalized local situs is stronger in the escheat case, where it is at least acting in its own interest rather than on behalf of a private litigant.

Jonnet, supra, 530 F.2d at 1139.

Considering the factors that might properly qualify as affiliating circumstances to support jurisdiction, *Hanson v. Denckla, supra,* gave short shrift to the proposition that the situs of personalty is the owner's domicile: "For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility." 357 U.S. at 249. We see no more jurisdictional[11] utility to the fiction that the corporation's

11. We readily concede that the law of the state of incorporation might be a critical, even controlling, factor for choice of law purposes. But questions of constitutional jurisdiction we believe are wholly different from choice of law issues.

domicile—the state of incorporation—is the situs of its stock. In *Texas v. New Jersey,* 379 U.S. 674 (1965), New Jersey argued that the state of incorporation of a debtor corporation ought to have the power to escheat an abandoned debt. Justice Black answered: "[I]t seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Ibid.* at 680. Here too we apply "principles of fairness" and see no reason to "exalt a minor factor."

While the focus of our attention has been the situs provision of § 169, the result we reach is buttressed by the operation in this case of the rule of *Sands v. Lefcourt Realty Corp., supra.* Under the interpretation that case gave to the statutory schema, the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction. Keeping in mind the admonition of *Mullane* that constitutional standards do not depend on "elusive and confused" state law classifications, we wonder whether this jurisdiction realistically ought to be considered as *quasi in rem.* The purpose of the Delaware procedure is to coerce the nonresident to submit to *in personam* jurisdiction. And it is difficult to conceive of a more potent jurisdiction—irrespective of its label—than the jurisdiction exercised here. Unless Gregg chose to default the $2 million in stock certificates he could have been held personally to answer for a claim in excess of $20 million in a forum unrelated to him or the transaction at issue. Of course, if this case were analyzed under an *in personam* rubric, the conclusion we have reached would follow just as surely.

Having been persuaded that the statutory situs of stock in Delaware under 8 Del. C. § 169 was an insufficient contact with the state constitutionally to support the juris-

diction here exercised, and that Gregg is entitled to relief on that basis, it is not necessary to meet Gregg's other constitutional contentions.

The judgment of default entered by the district court will be reversed and the proceedings remanded with a direction to dismiss the complaint for want of jurisdiction over the person.

APPENDIX F.

Opinion of the Supreme Court of the State of Delaware.

132, 1975.

THE GREYHOUND CORPORATION, ET AL.,
Defendants Below, Appellants,

v.

ARNOLD HEITNER, AS CUSTODIAN FOR MARK ANDREW HEITNER,
Plaintiff Below, Appellee.

Argued: October 15, 1975
Decided: April 15, 1976

Before DUFFY and MCNEILLY, *Justices*, and TAYLOR, *Judge*.

Upon appeal from the Court of Chancery. Affirmed in part.

Richard F. Corroon and Richard E. Poole, of Potter Anderson & Corroon, Wilmington, for defendant-appellant The Greyhound Corporation.

Max Terry, Jr., of Terry, Terry & Jackson, Dover, and William W. Schwarzer and Lynn H. Pasahow, of McCutchen, Doyle, Brown & Enersen, San Francisco, for individual defendants-appellants.

Joshua M. Twilley, of Twilley, Jones & Feliceangeli, Dover, and Michael F. Maschio and Carol Faye Simkin, of Cowan, Liebowitz & Latman, P. C., New York City, for plaintiff-appellee.

DUFFY, *Justice.*

The single question at issue in this appeal is the constitutionality of the Delaware Sequestration Statute and the related procedures thereunder. In our view, they do not violate due process of law requirements and, accordingly, we affirm the judgment of the Court of Chancery.

I.

The Sequestration Statute, 10 *Del. C.* § 366, has been an integral part of our law since 1927.[1] 35 *Del. L.* ch. 217;

1. In its present form 10 *Del. C.* § 366 provides:

"(a) If it appears in any complaint filed in the Court of Chancery that the defendant or any one or more of the defendants is a nonresident of the State, the Court may make an order directing such nonresident defendant or defendants to appear by a day certain to be designated. Such order shall be served on such nonresident defendant or defendants by mail or otherwise, if practicable, and shall be published in such manner as the Court directs, not less than once a week for 3 consecutive weeks. The Court may compel the appearance of the defendant by the seizure of all or any part of his property, which property may be sold under the order of the Court to pay the demand of the plaintiff, if the defendant does not appear, or otherwise defaults. Any defendant whose property shall have been so seized and who shall have entered a general appearance in the cause may, upon notice to the plaintiff, petition the Court for an order releasing such property or any part thereof from the seizure. The Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured. If such petition shall not be granted, or if no such petition shall be filed, such property shall remain subject to seizure and may be sold to satisfy any judgment entered in the cause. The Court may at any time release such property or any part thereof upon the giving of sufficient security.

"(b) The Court may make all necessary rules respecting the form of process, the manner of issuance and return thereof, the release of such property from seizure and for the sale of the property so seized, and may require the plaintiff to give

Sands v. Lefcourt Realty Corporation, Del. Supr., 117 A. 2d 365 (1955). Over the years since then a long line of cases has established the purpose of the Statute, its rationale and the procedure thereunder. Reference is made to those cases for a full definition of such matters.[2]

In *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433 (1921), the United States Supreme Court held that the Delaware foreign attachment statute was constitutional and, since the equitable remedy under § 366 is analogous to foreign attachment, *Sands v. Lefcourt Realty Corporation* supra, it is fair to say that *Ownbey* has been long regarded by the Court of this State as authority for the constitutionality of the Sequestration Statute. Cf. *Wiley v. Copeland*, Del. Supr., 349 A. 2d 211 (1975); *Gordon v. Michel* supra.

By its nature a foreign attachment, whether legal or equitable, involves a prejudgment seizure of property as a basis for jurisdiction and/or as a source of satisfaction for any judgment ultimately awarded on the merits of the claim. Such a proceeding has the seeds if not the fruits of unfairness in permitting the impounding of property before

1. (Cont'd.)

approved security to abide any order of the Court respecting the property.

"(c) Any transfer or assignment of the property so seized after the seizure thereof shall be void and after the sale of the property is made and confirmed, the purchaser shall be entitled to and have all the right, title and interest of the defendant in and to the property so seized and sold and such sale and confirmation shall transfer to the purchaser all the right, title and interest of the defendant in and to the property as fully as if the defendant had transferred the same to the purchaser in accordance with law."

2. See, for example, *Sands v. Lefcourt Realty Corporation* supra; *Greene v. Johnson*, Del. Supr., 99 A. 2d 627 (1953); *Loft, Inc. v. Guth*, Del. Supr., 19 A. 2d 721 (1941); *Gordon v. Michel*, Del. Ch. 297 A. 2d 420 (1972); *Trans World Airlines, Inc. v. Hughes Tool Company*, Del. Ch., 187 A. 2d 350 (1962); *Cantor v. Sachs*, Del. Ch., 162 A. 73 (1932); Folk, *The Delaware General Corporation Law*, p. 565.

judgment and, under some circumstances, upon thin assertions of right. But, as the discussion by Justice Pitney in *Ownbey* demonstrates, the practice traces its origin to early colonial days and, indeed, beyond them to the "custom of London." In law, however, as in the life it reflects, what is old is not necessarily good. Neither, we hasten to add, is it necessarily bad. But, as we are often reminded, due process concepts involve evolving standards of fairness and so the test for constitutionality is necessarily dynamic. Much has been decided and written about such concepts in recent years including their implications for Delaware sequestration procedures. See, for example, the thoughtful study by Folk and Moyer, *Sequestration in Delaware: A Constitutional Analysis*, 73 Colum. L. Rev. 749 (1973).

For present purposes the current due process standards must largely be distilled from a quartet of decisions by the United States Supreme Court, all of which involved prejudgment seizures of property; they are: *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, – U. S. –, 95 S. Ct. 719 (1975); *Mitchell v. W. T. Grant Company*, 416 U. S. 600, 94 S. Ct. 1895 (1974); *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983 (1972); *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820 (1969).

Those decisions provide a foundation for renewed constitutional attack upon the Sequestration Statute. The argument seems first to have been made in the Court of Chancery in *Gordon v. Michel* supra, but it was rejected as the Court concluded that *Ownbey* remained viable and that 10 *Del. C.* § 366 still passed constitutional muster. Following *Gordon* other Chancery decisions reached the same result. Then in *Wiley v. Copeland* supra this Court, in a brief *per curiam* opinion, found § 366 constitutional on the same rationale announced in *Gordon*.

This appeal came on for hearing shortly after *Wiley* was decided but we permitted full exploration of the issues in briefing and at oral argument because of the important questions involved, and because certain arguments are made herein which were not fully answered in *Wiley*.

Against that background, we now focus on this appeal.

II.

This is a stockholder's action, derivative in character and brought on behalf of The Greyhound Corporation (Greyhound) against some twenty-eight individuals (defendants) including directors of Greyhound (or its corporate predecessors) who served at various times between 1957 and 1974. The complaint alleges that Greyhound suffered significant loss and damage as a result of conduct by defendants which is said to have caused Greyhound to be found (by the United States District Court for the Northern District of Illinois) in violation of certain antitrust laws. The complaint also attacks the distribution of benefits under Greyhound's deferred compensation and stock option plans.

None of the defendants is a Delaware resident, all were served under the Sequestration Statute and relevant Rules of the Court of Chancery. Apparently, the Court-appointed Sequestrator seized certain Greyhound shares of stock and/or contract rights which defendants, respectively, had under agreements with Greyhound. The Court of Chancery denied both a motion by the individual defendants to dismiss the complaint for lack of jurisdiction and a motion by all defendants to vacate the order of sequestration. This appeal followed.

III.

The thrust of defendants' argument is that the sequestration procedure is inconsistent with controlling constitu-

tional principles. They say that the procedure, including that which obligates them to appear generally before defending on the merits, violates their right to due process of law.

Defendants argue that the minimum contacts requirements of *International Shoe Co. v. Washington,* 326 U. S. 310, 66 S. Ct. 154 (1945), must be met before *personam* jurisdiction is assumed and they say that they are entitled to a meaningful right to be heard under *Boddie v. Connecticut,* 401 U. S. 371, 91 S. Ct. 280 (1971), before their property may be seized. And, they continue, the passage of time and changing concepts of due process "have rendered *Ownbey* obsolete."

A.

There are significant constitutional questions at issue here but we say at once that we do not deem the rule of *International Shoe* to be one of them. An argument based on that case was made in *Breech v. Hughes Tool Company,* Del. Supr., 189 A. 2d 428 (1963), and rejected by this Court. Compare *Hibou, Inc. v. Ramsing,* Del. Super., 324 A. 2d 777 (1974). We are not persuaded that *Breech* should now be abandoned. The reason, of course, is that jurisdiction under § 366 remains, as it was in 1963, *quasi in rem* founded on the presence of capital stock here, not on prior contact by defendants with this forum. Under 8 *Del. C.* § 169 [3] the "situs of the ownership of the capital stock of all corporations existing under the laws of this

3. 8 *Del. C.* § 169 reads in full as follows:

"For all purposes of title, action, attachment, garnishment and jurisdiction of all courts held in this State, but not for the purpose of taxation, the situs of the ownership of the capital stock of all corporations existing under the laws of this State, whether organized under this chapter or otherwise, shall be regarded as in this State."

State . . . [is] in this State", and that provides the initial basis for jurisdiction. Delaware may constitutionally establish situs of such shares here, *Rogers v. Guaranty Trust Co. of New York,* 288 U. S. 123, 53 S. Ct. 295 (1932); *Jellenik v. Huron Copper Min. Co.,* 177 U. S. 1, 20 S. Ct. 559 (1900), it has done so and the presence thereof provides the foundation for § 366 in this case. Cf. *Breech v. Hughes Tool Company* supra. On this issue we agree with the analysis made and the conclusion reached by Judge Stapleton in *U. S. Industries, Inc. v. Gregg,* D. Del., 348 F. Supp. 1004 (1972).

We hold that seizure of the Greyhound shares is not invalid because plaintiff has failed to meet the prior contacts tests of *International Shoe.*

As to *Boddie,* we agree that it contains an important summary of due process requirements, including a "meaningful opportunity" to be heard before one is deprived of any significant property interest. But the implications of *Boddie* for this appeal may best be understood, not by reference to its general principles but in light of an analysis of *Sniadach, Fuentes, Mitchell* and other cases dealing with foreign attachments. And now we turn to those cases.

B.

In *Sniadach,* decided in 1969, the Supreme Court invalidated on due process grounds a Wisconsin statute which authorized garnishment of wages, at the request of a creditor's lawyer, before trial without any opportunity for the wage owner to be heard or to tender a defense. In the absence of "notice and a prior hearing," said the Court, the procedure was deemed unconstitutional. But, writing for the Court, Justice Douglas recognized an *Ownbey* exception in so many words; after referring to seizure without notice or hearing he said:

> "Such summary procedure may well meet the requirements of due process in extraordinary situations . . . . *Ownbey v. Morgan*. . . ." 395 U. S. at 339, 89 S. Ct. at 1821.

Some three years later the Court decided *Fuentes*, in which it invalidated Florida and Pennsylvania prejudgment replevin statutes applied to household goods sold under conditional contracts. The statutes denied the purchasers the opportunity to be heard before seizure and that, said the Court, violated due process, in each instance. The writ issued on bare assertions of right and in neither State was a judge involved. Speaking for the Court, Justice Stewart said:

> "We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor. . . ." 407 U. S. at 97, 92 S. Ct. at 2002.

But, citing *Boddie*, he stated that there "are 'extraordinary situations' that justify postponing notice and opportunity for a hearing"; and he added a footnote, saying:

> "In three cases, the Court has allowed the attachment of property without a prior hearing. In one, the attachment was necessary to protect the public against the same sort of immediate harm involved in the seizure cases—a bank failure. *Coffin Brothers & Co. v. Bennett*, 277 U. S. 29, 48 S. Ct. 422, 72 L. Ed. 768. Another case involved attachment necessary to secure jurisdiction in state court—clearly a most basic and important public interest. *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433, 65 L. Ed. 837." *Fuentes v. Shevin* supra 407 U. S. at 91, 92 S. Ct. at 1999, n. 23.

Two years later the Court decided *Astol Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U. S. 663, 94 S. Ct. 2080 (1974), in which, citing *Fuentes, Sniadach* and *Boddie* it again found and applied in Justice Brennan's language "one of those 'extraordinary situations' that justify postponing notice and opportunity for a hearing." In applying the "limited circumstance" test stated in *Fuentes*, he noted that the seizure (of a yacht) served a significant governmental purpose by permitting Puerto Rico to assert *in rem* jurisdiction over the property in order to conduct forfeiture proceedings; the following footnote was cited to that quotation, again implicitly approving *Ownbey*:

> "Cf. *Ownbey v. Morgan*, 256 U. S. 94, 65 L. Ed. 837, 41 S. Ct. 433, 17 ALR 873 (1921), cited with approval in *Fuentes v. Shevin* supra, at 91 n. 23, 32 L. Ed. 2d 556."

It seems clear from the writing of three different Justices in the above three cases that until May 15, 1974 *Ownbey* was still viable for some purposes; indeed, all three had referred to the case by name, with explicit or implicit approval.

The next case in time, *Mitchell*, was also decided in 1974. There Justice White referred to prejudgment seizures approved under the special circumstances found in *Ewing v. Mytinger and Casselberry*, 339 U. S. 594, 70 S. Ct. 870 (1950) and then said,

> "More precisely in point, the Court had unanimously approved prejudgment attachment

liens effected by creditors, without notice, hearing, or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its affect upon the result of the suit.' 'The fact that the execution is issued in the first instance by an agent of the State but not from a court, followed as it is by personal notice and a right to take the case into court, is a familiar method in Georgia and is open to no objection.' Coffin Brothers v. Bennett. . . . To the same effect was the earlier case of Ownbey v. Morgan. . . . Furthermore, based on *Ownbey* and *Coffin*, the Court later sustained the constitutionality of the Maine attachment statute. McKay v. McInnes, 279 U. S. 820, 49 S. Ct. 344, 73 L. Ed. 975 (1928).

. . .

The judgment of the Maine court was affirmed without opinion citing *Ownbey* and *Coffin*." *Mitchell* v. *W. T. Grant Company* supra, — U. S. at —, 94 S. Ct. at 1903.

While the Court's discussion of *Ownbey* is arguably less than explicit approval, it seems clear that it was not overruled and, indeed, in our view the Court looked to it as precedent for approval of the Louisiana sequestration statute in *Mitchell*.

In 1975 the Court decided *North Georgia Finishing, Inc. v. Di-Chem, Inc.* supra, in which it invalidated a Georgia garnishment statute that permitted prejudgment seizure of property on an affidavit of plaintiff or his attorney. The Court noted that in *Fuentes*, Fourteenth Amendment violations were found "[b]ecause the official seizures

had been carried out without notice and without opportunity for a hearing or other safeguard against mistaken repossession" and, said Justice White for the Court, "[t]he Georgia statute is vulnerable for the same reasons." While his opinion does not refer to *Ownbey*, the concurrence by Justice Powell cites it as an illustration of "unanimously approved prejudgment attachment liens" under the "traditional view of procedural due process."

C.

While the significance of these decisions for foreign attachment statutes in the States is by no means complete, or clear, we can, we think, draw two inferences from what the Court has said about *Ownbey*. First, an attachment which is necessary to secure jurisdiction in a State court is an "extraordinary situation" under *Boddie*. *Fuentes* so holds in so many words (denoting it as "clearly a most basic and important public interest") and the same view is echoed in *Astol Calero-Toledo*, in *Mitchell* and by Justice Powell in his concurring opinion in *North Georgia*. The second inference is that, given an "extraordinary situation", pre-seizure notice and hearing are not required by the due process clause,[4] *Jonnet* v. *Dallas Savings Bank*, 3 Cir. — F. 2d — (1976). Those inferences seem reasonable and they are certainly addressed to the common sense of what is involved; prior notice of seizure would permit a defendant to divest the court of a jurisdiction which, by definition, it has over the *res*—he could simply take it out

4. It is not clear whether the presence of adequate safeguards alone will comport with due process where there was no pre-seizure notice and hearing, or whether the safeguard procedure is available only under extraordinary situations as identified in *Boddie*. We need not decide the question because, for the reasons already stated, we think that the United States Supreme Court has said that *Ownbey* qualified under *Boddie* and so, inferentially, does § 366.

of the State or defeat jurisdiction by a transfer of title. And a plaintiff would thus lose a right, which he would otherwise have, to take the case into court. We hold that § 366 is not unconstitutional because seizure precedes notice and hearing.

In *North Georgia* the Supreme Court based its ruling on the absence of "notice and . . . opportunity for a hearing or other safeguard." The disjunctive character of that quotation from Justice White supports our conclusion that prior notice and hearing are not mandated by the Fourteenth Amendment. But "other safeguards" are required if the sequestration procedure is to square with the Constitution. So we must now examine § 366 from that point of view. Precisely what requirements the Court has in mind for safeguards is not certain but some insight is available from what it has approved and what it has criticized. It has said, for example, that there must be a hearing and judicial determination "before one is finally deprived of his property," *Mitchell v. W. T. Grant Company*, supra. And in *North Georgia* the Court made a number of criticisms about the procedure, including the fact that the writ issued at the order of a clerk without participation by a judge, the affidavit was sufficient with conclusory allegations made by an attorney without personal knowledge of the facts, the debtor was deprived of the use of the property and there was no provision for an early hearing.

Since the requirements of due process "are not technical, nor is any particular form of procedure necessary," *Mitchell v. W. T. Grant Company* supra, we deem it unnecessary to litmus test Delaware sequestration procedure against every facet of the foreign attachment proceedings approved or invalidated in the governing cases we have reviewed. We review, rather, certain of the significant features of the Delaware procedure which seem relevant to the respective interests of the parties.

D.

As the Third Circuit said in *Jonnet*, a plaintiff has two interests in invoking foreign attachment procedures: to establish jurisdiction in the forum and to restrain a *res* within the control of the Court for eventual payment of a judgment. In Delaware the first of these is the principal and under most circumstances the exclusive basis for sequestration. Indeed, by its terms § 366 permits the "Court [to] . . . compel the appearance of the defendant by the seizure," a purpose underscored by the cases. Cf. *Sands v. Lefcourt Realty Corporation* supra; *Gordon v. Michel* supra.

On this point we pause to note, as did the Vice Chancellor, that *Sniadach*, *Fuentes*, *Mitchell* and *Georgia* all involved prejudgment seizures, by attachment proceedings, for the purpose of collecting moneys claimed to be owed. And so did the most recent decision by the Supreme Court on this question: *Carey v. Bert Randolph Sugar*, — U.S. —, — S. Ct. —, 44 L. W. 4416 (3/24/76). All of those cases involve claims by creditors against resident debtors, none sought attachment to establish state jurisdiction which is what this appeal is all about.[5] While that difference may be determinative in distinguishing this case from creditor type cases, we do not base our conclusion on it.

As to safeguards or protection of a defendant's interest, the following appear significant to us:

(1) An order of Court is required to initiate the § 366 process and, beyond doubt, that requires an order of a Judge of the Court of Chancery who has control of the process at all times.

5. The statute permits seizure only if defendant is a non-resident. See § 363, *Wife v. Husband*, Del. Ch., 271 A. 2d 51 (1970). Compare *Astol Calero-Toledo v. Pearson Yacht Leasing Co.* supra.

(2) The property to be seized must be identified with reasonable certainty in the Court order.[6] *Cannon v. Union Chemical & Materials Corp.*, Del. Ch. 144 A. 2d 145 (1958). Compare *Baker v. Gotz, D. Del.* 336 F. Supp. 197 (1971); aff'd 492 F. 2d 1238; cert. den. 417 U. S. 955, 94 S. Ct. 3084 (1974).

(3) The value of the property seized must be reasonably related to the amount of the claim asserted.[7] *Trans World Airlines, Inc. v. Hughes*, Del. Ch., 185 A. 2d 762 (1962), aff'd 185 A. 2d 886 (1962).

(4) Following seizure, notice thereof must be promptly given to defendant. § 366, Chancery Rule 4(db).

---

6. Chancery Rule 4(db) provides in part:

"No order shall be entered under 10 *Del. C.* § 366 unless it appears in the complaint that the defendant or any one or more of the defendants is a nonresident of the State of Delaware and the application therefor is accompanied by the affidavit of a plaintiff or other credible person stating:

(a) As to each nonresident defendant whose appearance is sought to be compelled, his last known address or a statement that such address is unknown and cannot with due diligence be ascertained.

(b) The following information as to the property of each such defendant sought to be seized:

(1) A reasonable description thereof.

(2) The estimated amount and value thereof.

(3) The nature of the defendant's title or interest therein; and if such title or interest be equitable in nature, the name of the holder of the legal title.

(4) The source of affiant's information as to any of the items as to which the affidavit is made on information and belief.

(5) The reason for the omission of any of the required statements."

7. Sequestration is available only when a money judgment is sought. *Steinberg v. Shields*, Del. Ch., 152 A. 2d 113 (1959).

(5) A general appearance is required before release of property seized, but under both the statute and the Chancery practice a defendant has a right to appear solely for the purpose of attacking compliance with § 366 and the Rules of Court.[8] *Schwartz v. Miner*, Del. Ch., 133 A. 2d 599 (1957). Indeed, defendants are doing that very thing here without having made a general appearance. If sequestration is determined to be valid, each defendant has an option to appear generally or not.[9] *Schwartz v. Miner* supra.

(6) After seizure a defendant who has entered a general appearance may petition for release of the property and the "Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

(7) A defendant who elects to appear generally after seizure will be called upon to litigate only those causes of action asserted against him in the original complaint; he may not be confronted with new causes of action. *Tenney v. Jacobs*, Del. Supr., 240 A. 2d 138 (1968); *Townsend Corporation of America v. Davidson*, Del. Ch., 181 A. 2d 219 (1962).

(8) While the property seized is in the control of the Court, a defendant does not lose all right over it.

---

8. Such an appearance is made under Chancery Rule 12(b) by filing a motion to dismiss for lack of jurisdiction. In earlier days a "special appearance" was permissible for the same purpose. See, for example, *Whitman v. San Francisco Bay Toll Bridge Co.*, Del. Ch., 142 A. 783 (1928).

9. Discovery is available for the purpose of determining whether there has been an effective sequestration, cf. *Kolyba v. Banque Nationale de Paris*, Del. Ch., 316 A. 2d 585 (1973), but it may not be had for a fishing expedition to find property subject to seizure. *Chavin v. Gluck*, Del. Ch., 216 A. 2d 142 (1965).

Thus the sequestration order entered in this case, which follows what we understand to be the usual practice, states:

> "4. In the event that the defendants or any one of them shall make a bona fide sale or sales of any of the aforesaid property seized hereunder, and shall receive therefor not less than the market price at the time of sale and shall deposit with the Sequestrator the proceeds of such sale or sales, the Sequestrator shall forthwith advise the Greyhound Corporation of such facts and thereupon the property sequestered and seized and so sold shall be released from such sequestration and seizure without further action of any kind by the Sequestrator or this Court; and in such event, the proceeds of any such sale shall be held by the Sequestrator until further order of this Court in lieu of the property initially seized and so sold; provided, further, that the proceeds of any such sale or sales shall be subject to investment and reinvestment by the Sequestrator in such property and upon such terms and conditions as the defendants may from time to time direct in writing, provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any sale of such property) shall be held by and in the name of the Sequestrator, pursuant to the terms of this Order and until further Order of this Court.
>
> "In the event that said Greyhound Corporation shall desire to make any payments under any agreements, contract or other legal instrument of

> any kind whatsoever between any of said defendants and said corporation being seized under this Order by the Sequestrator, any such obligations, rights, debts or credits may be discharged by the payment of the sums due from said corporation, as may be appropriate, to the Sequestrator and said corporation, as may be appropriate, may receive a full and complete discharge of said contractual obligations, rights, debts or credits from each or any of said defendants, and the Sequestrator hereinbefore appointed; and in such event, the proceeds of the payment of any of the aforesaid contractual obligations, rights, debts or credits shall be held by the Sequestrator until the further order of this Court in lieu of the contractual obligations, rights, debts, or credits initially seized and so paid or discharged, provided further that the proceeds of any such payment or payments shall be subject to investment and reinvestment by the Sequestrator upon such terms and conditions as each or any of said defendants may from time to time direct in writing; provided always that the property in which such proceeds are invested and reinvested (as well as any uninvested proceeds of any such payment) shall be held by and in the Sequestrator, pursuant to the terms of this Order and until the further Order of this Court."

In addition to those safeguards, we think that there is another (from a defendant's point of view) which has not been emphasized in the cases but which is implicit in § 366. The statute permits a defendant who has appeared generally to petition for release of seized property and

> "[t]he Court shall release such property unless the plaintiff shall satisfy the Court that because of other circumstances there is a reasonable possibility that such release may render it substantially less likely that plaintiff will obtain satisfaction of any judgment secured."

In order to make such a determination the Court of necessity must be informed not only of the value of the property seized but also of what effect release of the property will have on satisfaction of any judgment which plaintiff may secure. To know that, *i.e.*, what judgment may be secured, the Court must be informed about the possible amount of such judgment and, clearly, that means at least some preliminary inquiry into the merits of the claim. Cf. *Carey v. Bert Randolph Sugar* supra. Compare Vice Chancellor Marvel's 1969 ruling in *Trans World Airlines, Inc. v. Hughes* supra in which he said that ". . . of course, the property . . . seized should always bear some reasonable relationship to the amount of the claim asserted." Manifestly, the complaint or other statement by a plaintiff cannot be conclusive on the value or merits of the claim.

In sum, the sequestration procedure is at all times under the control of a judge; a defendant has a right to litigate compliance with the Statute and the Rules of Court without appearing generally; if the Court determines that there has been a valid seizure a defendant may then elect to appear generally; if he does so appear he is entitled to release of the property unless plaintiff meets the statutory terms; and a defendant is entitled to a hearing to test the reasonableness of the value of the property seized, including to the extent pertinent, the merits of plaintiff's claim.

In our view, § 366 and the related procedures provide a reasonable balancing of interests between plaintiff and defendants and assure to the latter the safeguards required

under current guidelines established by the United States Supreme Court.

E.

Defendants argue also that compelling them to make a general appearance before defending on the merits violates their right to due process. They rely principally on decisions by Courts in New York holding that an obligation under a liability insurance policy may be a basis for jurisdiction over personal injury litigation, but liability of a non-resident defendant who appears is limited to the face value of the policy. *Farrell v. Piedmont Aviation, Inc.*, 2d Cir., 411 F. 2d 812 (1969); *Minichiello v. Rosenberg*, 2d Cir., 410 F. 2d 106 (1968), cert. den., 396 U. S. 844, 90 S. Ct. 69, 24 L. Ed. 2d 94 (1969); *Jarvik v. Magic Mountain Corp., S. D. N. Y.*, 290 F. Supp. 998 (1968); *Simpson v. Loehmann*, N. Y. App., 234 N. E. 2d 669 (1967); rearg. den., 238 N. E. 2d 319 (1968).

We do not regard the rationale of those cases as persuasive authority for the due process argument which defendants make here. As the cited cases indicate, the theory of suit and the practice thereunder spawned a considerable volume of Federal-State litigation which has apparently resulted in settled law in New York. But the attachment theory and the limited liability imposed on an appearing defendant have apparently been adopted only in New York. See *Ann.* 33 A. L. R. 3d 992. And even in New York the doctrine is limited to claims based on an insurance policy. Thus in *Simpson v. Loehmann* the New York Court of Appeals said:

> "This, it is hardly necessary to add, means that there may not be any recovery against the defendant in this sort of case in an amount greater than the face value of such insurance policy even

> though he proceeds with the defense on the merits. Consideration of CPLR 320 (subd. [c]) and its effect in other types of action begun by attachment must, of course, await future cases." 238 N. E. 2d at 320.

We decline to proceed here on the basis of what New York alone has done in personal injury claims under insurance policies.

We agree with Judge Stapleton also when he said in *U. S. Industries,* 58 F. R. D. at 479, that there is a "legitimate public interest behind the general appearance rule"; it promotes judicial economy by concentrating the settlement of claims in one jurisdiction or action. And, that is particularly desirable in the kind of controversy here involved. According to the amended complaint, this is essentially a intra-corporate dispute between a complaining shareholder, who sues for the corporation, alleging loss and damage resulting from conduct of defendants in their respective capacities as directors and/or officers of Greyhound. The charges are that defendants caused the Corporation to be in contempt of orders of the United States District Court for which substantial fines were imposed on Greyhound, caused Greyhound to violate the anti-trust laws, and unjustly enriched themselves through stock options and deferred compensation plans. Such a controversy surely has a substantial relationship to this forum, *Folk and Moyer* supra, and litigation here will eliminate the possibility of duplicate actions elsewhere with varying results.

We hold that § 366 is not unconstitutional because it requires defendants to appear generally before defending on the merits.

IV.

Defendants argue also that the sequestration procedure is unconstitutional as applied to the interests of security holders whose certificates are located outside the State. They say that the certificates for the seized shares are physically outside Delaware and that the statutory attempt under 8 *Del. C.* § 169 to reserve the situs of shares here is "to indulge in a fiction."

The argument is based largely, if not exclusively, on the right of a bona fide purchaser who acquires a certificate and, so far as we are informed, there is no such purchaser among defendants. As to these defendants, we have already determined that the shares have a situs here, *Rogers v. Guaranty Trust Co. of New York* supra; *Jellenik v. Huron Copper Min. Co.* supra; *U. S. Industries, Inc. v. Gregg* supra; compare *Breech v. Hughes Tool Company* supra, and, for present purposes that is conclusive on this contention.

V.

Finally, we turn to the argument made by Greyhound Corporation, for whose benefit plaintiff alleges that he sues.

Greyhound says that the sequestration order deprives it of property without due process of law. It attacks that part of the order under which the Sequestrator directed it "not to transfer or permit to be transferred any of said shares of stock," (*i.e.*, the seized shares) except pursuant to Court order. Relying on *Haas v. Haas,* Del. Ch., 119 A. 2d 358 (1955), Greyhound argues that the individual defendants retain the power to pass good title to their shares to a good faith purchaser and that under the Uniform Commercial Code (6 *Del. C.* §§ 8-301, 8-102, 8-105) such a transferee would take title unaffected by the se-

questration proceedings; and, Greyhound continues, it would be obliged to transfer the shares on its books or be liable for any loss resulting from a refusal or a delay in doing so. 6 *Del. C.* § 8-401(2).[10]

The Vice Chancellor disposed of Greyhound's argument on the basis of the Uniform Commercial Code, 5A *Del. C.* § 8-317, which reads:

> "Nothing contained in this subtitle shall repeal, amend or in any way effect the provisions of sections 169 and 324, title 8, or sections 365 and 366, and chapter 35, title 10; and to the extent that any provision of this subtitle is inconsistent with such sections, sections 169 and 324, title 8, and 365 and 366 and chapter 35, title 10, shall be controlling."

He noted the priority of § 366 by the terms of the Uniform Commercial Code and suggested that Greyhound could find protection by complying with the sequestration order and § 8-317.

As to Greyhound's reliance on *Haas*, he said that the conflict there did not involve a sequestration order and UCC priorities, and that defendants remain free to transfer their stock under the order of sequestration and the general practice. Cf. *Trans World Airlines, Inc. v. Hughes Tool Company* supra.

In this Court Greyhound points to a number of situations in which it might be caught in a legal dilemma and be faced with a claim for loss. These all contemplate a

10. 6 *Del. C.* § 8-401(2) provides:

"Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal for loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer."

transfer by a defendant in violation of the sequestration order or a claim by a bona fide purchaser who was made so by a defendant under circumstances which violate the order of sequestration.

None of such facts or claimants are before the Court.

We recognize the desirability of quieting fears about the free transferability of shares traded on a national stock exchange but we are not persuaded that that or any other reason advanced by Greyhound provides a basis on which this Court can or should state an opinion. In brief, there is not before us a controversy calling for a judicial judgment, even on a declaratory basis. Accordingly, we decline to decide the issue.

• • •

Affirmed in all respects except as noted in Section V.

Supreme Court, U. S.
FILED
OCT 7
MICHAEL RODAK, JR. CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-359

U. S. INDUSTRIES, INC. and
DIVERSACON INDUSTRIES, INC.,
Petitioners,

versus

F. BROWNE GREGG,
Respondent.

BRIEF IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-359

U. S. INDUSTRIES, INC. and
DIVERSACON INDUSTRIES, INC.,
Petitioners,

versus

F. BROWNE GREGG,
Respondent.

BRIEF IN OPPOSITION

Respondent opposes issuance of the writ of certiorari sought by petitioners, conceiving that petitioners' statement of the question presented is both overbroad and inaccurate. Moreover, petitioners' statement of the case omits reference to material facts which clearly demonstrate that the judgment and result of the Circuit Court decision below are correct on the stated ground as well as on the basis of two additional constitutional grounds not reached by that court.

QUESTIONS PRESENTED

Respondent conceives that the questions presented should be stated as follows:

I.

Does application of the Delaware statute which provides that Delaware is the situs of Delaware corporate stock (8 DEL.C. §169), in support of judicial seizure, under Delaware's sequestration procedure,* of stock in a Delaware corporation owned by a nonresident defendant having no contacts with Delaware other than such stock ownership, for the purpose of compelling that defendant's personal appearance in Delaware to answer transitory claims wholly unrelated to Delaware upon pain of forfeiting his interest in the stock for failure to personally appear, offend the concepts of fundamental fairness embodied in the due process clause of the fourteenth amendment to the United States Constitution as construed in *International Shoe Company* v. *Washington* (1945), 326 U.S. 310; and *Hanson* v. *Denckla* (1958), 357 U.S. 325?

II.

Does the Delaware sequestration procedure — which provides for pre-hearing seizure of property owned by a nonresident defendant in which plaintiff has no right or lien; does not require the complaint to be verified or the supporting affidavit to contain proof of the specific facts underlying the plaintiff's claim; permits the judge to issue the order without determining that plaintiff's claim has apparent validity; and does not require plaintiff

* See 10 Del.C. §366; 8 Del.C. §324; 6 Del.C. §8-317(1); Del.Ch.Rule 4(db).

to post a sufficient bond to protect the defendant against damages; and requires the sale of the property before an appealable judgment can be entered — violate the minimum procedural prerequisites held to be required by the due process clause of the fourteenth amendment to the United States Constitution in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975), 419 U.S. 601; *Mitchell* v. *W. T. Grant Company* (1974), 416 U.S. 600; *Fuentes* v. *Shevin* (1972), 407 U.S. 67; and *Sniadach* v. *Family Finance Corporation* (1969), 395 U.S. 337?

III.

Does the Delaware sequestration procedure violate the requirements established by the due process clause of the fourteenth amendment to the United States Constitution by forcing a nonresident defendant having no significant contact with the State of Delaware, other than that created by the fictional situs of stock statute (8 DEL.C. §169), to submit to the general jurisdiction of the Delaware courts and defend against transitory claims unrelated to Delaware without limiting liability to the value of the property sequestered, upon pain of forfeiture of that property should defendant not so appear?

STATEMENT OF THE CASE

The constitutional question decided by the Circuit Court below arose in the following manner:

U. S. Industries, Inc. (USI), a Delaware corporation having its principal place of business in New York, and Diversacon Industries, Inc. (Diversacon), a Florida corporation having its principal place of business in Florida, instituted this action against F. Browne Gregg, a citizen and resident of the State of Florida, in the Delaware Court of Chancery (Pet. A. 9-10).* The complaint was divided into eight counts which contained claims for common law deceit; federal securities law violations; breach of warranty; rescission; and breach of contract (Pet. A. 10-11). It sought $20 million in damages and the impressment of a constructive trust on USI stock held by Gregg (Pet. A. 11-12). None of the claims arose out of either Gregg's or plaintiffs' title to, or property rights in, the USI stock sequestered (Pet. A. 10-11).

Delaware law provides that all stock in Delaware corporations is to be regarded as having a situs in Delaware. 8 DEL.C. §169. Employing the Delaware sequestration statute (10 DEL.C. §366), plaintiffs made an ex parte application in the Delaware Chancery Court for an order of sequestration directed to Gregg's USI stock (Pet. A. 67). The Chancery Court promptly entered such an order. Because of the provisions of Delaware Chancery Rule 4(db), adopted pursuant to Section 366(b) of Title 10 of the Delaware Code, plaintiffs were not required to, and did not, file a properly verified complaint. They filed the required affidavit stating: (a) the last-known address of the non-resident defendant; (b) a reasonable description of the property sought to be seized, its estimated amount or value,

* Hereinafter, (Pet. ___) refers to the Petition for Writ of Certiorari filed herein, and (Pet. A. ___) refers to the Appendices to the Petition for Writ of Certiorari.

and the nature of the defendant's title or interest therein; (c) the source of affiant's information as to any of these items; and (d) the reason for omission of any items not included. There is no requirement that the court make any finding concerning the probable validity or amount of a plaintiff's claim, and the Chancery Court merely found that Gregg was a non-resident and that he had property within the State of Delaware. In order to obtain such an order, it was not necessary for plaintiffs to post a bond in an amount sufficient to cover Gregg's potential damages and attorneys' fees should it subsequently be determined that the sequestration order was improvidently entered; and, in fact, while the stock seized was worth more than $2 million, plaintiffs and the sequestrator were each required to file a nominal bond of only $1,000 (Pet. A. 67).

Gregg promptly removed the action to federal court pursuant to the provisions of Title 28, United States Code, Section 1441(c), and the District Court denied a motion to remand filed by plaintiffs (Pet. A. 9).* Before the time for Gregg to respond to the complaint had passed, he moved for leave to enter a "limited" or

* In the meantime, Gregg had filed a complaint against USI in the United States District Court for the Middle District of Florida, seeking compensatory damages. *F. Browne Gregg* v. *U. S. Industries, Inc.* (filed July 24, 1972), No. 72-25-Civ-Oc. The original complaint alleged that USI had been guilty of common law fraud and deceit; violations of the federal securities laws; breach of contract; and wrongful withholding of dividends. After Gregg refused to personally appear in Delaware, USI counterclaimed in the Florida action, presenting the same claims it had made in Delaware. This action resulted in a final judgment, filed on March 15, 1976, in favor of Gregg in the amount of $1,192,000. The case is presently on appeal to the United States Court of Appeals for the Fifth Circuit. *U. S. Industries, Inc.* v. *F. Browne Gregg* (notice of appeal filed April 14, 1976), No. 76-2107.

"restricted" appearance in the District Court for purposes of defending the claims made by plaintiffs on the merits, limiting liability to the value of the property sequestered, without thereby subjecting himself to the *in personam* jurisdiction of the court (Pet. A. 42). Prior to this motion, Gregg had filed a motion to quash the sequestration and dismiss the lawsuit on the grounds that the court lacked jurisdiction over either the property seized or his person, and that the purported sequestration of Gregg's stock violated the due process and equal protection clauses of the fourteenth amendment to the United States Constitution (Pet. A. 13, 25). Both of these motions were denied by the District Court (Pet. A. 9, 41).

Thus, Gregg was faced with the choice of not appearing to defend the action in Delaware, thereby forfeiting his stock in USI; or submitting himself to the personal jurisdiction of the District Court in Delaware, thereby being forced to defend himself in an inconvenient and unrelated forum where he faced a potential liability in excess of $20 million (Pet. A. 91). Gregg chose not to appear, and instead sought certification from the District Court, pursuant to Title 28, United States Code, Section 1292(b), so that he might obtain appellate review of its decisions. The District Court denied the application for certification. Gregg then filed a notice of appeal, together with a petition for writ of mandamus or prohibition, seeking to obtain review of the District Court's rulings. The appeal was dismissed without prejudice to Gregg's right to have the matters reviewed on ultimate appeal from a final order; and the petition for writ of mandamus or prohibition was denied.

The District Court then held an ex parte hearing, at which time plaintiff Diversacon presented proof of its claim on the note. As a result of this hearing, the District Court entered an order finding that Gregg was indebted to Diversacon in an amount exceeding $400,000, and directing that the shares of stock earlier sequestered be sold to satisfy this indebtedness. Gregg again attempted to appeal, and was again thwarted because no final judgment had yet been entered by the District Court.

Finally, Gregg's stock was sold pursuant to court order. *Thereafter,* a final judgment was entered, at which time an appeal was taken to the Circuit Court below. It is from that decision that petitioners seek review by this Court.

REASONS FOR DENYING THE WRIT

Before responding specifically to each of petitioners' reasons for granting the writ in this case, it is important to place the decision of the Circuit Court below in perspective. That decision does not raise questions of great national concern which bring into question the validity of the attachment or sequestration statutes of virtually every state, as petitioners suggest (Pet. 11). Only Delaware, of all the fifty states, has failed to join with the other forty nine in accepting the principle that judicial seizure of corporate stock can be accomplished only by physically seizing the certificates themselves.* Delaware alone persists in maintaining the fiction that the legal situs of stock in Delaware corporations remains in Delaware and, as Delaware corporate stock is widely

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* Uniform Commercial Code §8-317. (Pet. A. 64.)

traded throughout the United States and, indeed, the world, Delaware purports to extend the jurisdiction of its courts to any and all claims against a nonresident solely by reason of his ownership of Delaware corporate stock. Delaware has never enacted the usual long arm statute asserting jurisdiction over nonresident defendants; rather, Delaware uses its sequestration procedure as a "long arm statute" for acquiring personal jurisdiction over such nonresident defendants. Hence, the decision below has a significant effect on the State of Delaware, but not necessarily on any other state, and thus does not present any question of significant national concern such as to warrant the exercise of this Court's power of review.

I. The Decision Below Does Not Irreconcilably Conflict With the Contemporaneous Decision of the Supreme Court of Delaware Cited by Petitioners.

Petitioners contend that the decision of the Circuit Court below irreconcilably conflicts with the decision of the Supreme Court of Delaware in *The Greyhound Corporation* v. *Heitner* (1976), 361 A.2d 225,* from which an appeal to this Court is presently pending *sub nom. Shaffer et al., appellants* v. *Heitner, appellee*, No. 75-1812. It is true that the Circuit Court below held that the constitutional validity of the use of the Delaware sequestration procedure as a means of obtaining personal jurisdiction over respondent in this case must be tested in light of the criteria set forth in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, and *Hanson* v. *Denckla* (1958), 357 U.S. 235 (Pet. A. 87),

* The opinion is not yet printed in the official Delaware Reports.

while the Supreme Court of Delaware held, in the *Greyhound* case, that it was not necessary for the *International Shoe* requirements to be met before the sequestration procedure could be found to pass constitutional muster as a means of obtaining jurisdiction over the defendants. 361 A.2d at 229. To this extent, there is an apparent conflict between the two decisions.

However, in arriving at its conclusion, the Delaware Supreme Court relied upon a fallacious a priori assumption, *i.e.*, that the legal fiction created by Section 169 of Title 8 of the Delaware Code, which provides that Delaware shall be regarded as the situs of all stock in any corporation existing under the laws of Delaware, was sufficient, *in itself*, to create *quasi in rem* jurisdiction over nonresident defendants owning stock in a Delaware corporation. As the Circuit Court below correctly pointed out, that assumption by the Supreme Court of Delaware disregarded the decisions of this Court in *Texas* v. *New Jersey* (1965), 379 U.S. 674, 380 U.S. 518; *Western Union Telegraph Co.* v. *Pennsylvania* (1961), 368 U.S. 71; *Hanson* v. *Denckla* (1958), 357 U.S. 235; and *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306; all of which recognize that, regardless of the label employed by a state court to identify the basis of its jurisdiction, there is a constitutional limit beyond which such jurisdiction may not be extended. Because the Delaware Supreme Court failed to deal with these controlling decisions, the conflict between its decision in *Greyhound* and the decision of the Circuit Court below is more apparent than real.

It is also noteworthy that, because of a factual distinction between this case and the *Greyhound* case, adoption of the decision of the Circuit Court below by the Supreme Court of Delaware would not necessarily mandate a reversal of its decision in *Greyhound*. The Circuit Court below found that, before the courts of Delaware can coercively acquire personal jurisdiction over a nonresident defendant, there must exist certain minimum contacts between that defendant and Delaware (Pet. A. 86). In this case, where the defendant was not a resident of Delaware, there was no connection with Delaware except for that based upon the legal fiction of the situs of stock of a Delaware corporation created by Section 169 of Title 8 of the Delaware Code, and the action brought by plaintiffs bore no relationship to the corporate stock or the validity of its ownership, the Circuit Court below held that

> "the fictional § 169 situs of stock in Delaware does not pass constitutional muster as a predicate for jurisdiction in an action admittedly seeking to obtain personal liability of a nonresident in connection with transactions unrelated to the forum."
>
> (Pet. A. 89.)

In *Greyhound*, however, the action brought by plaintiffs was a stockholders' derivative suit on behalf of a Delaware corporation to recover for damages to the corporation resulting from the conduct of the defendants in their capacities as officers and/or directors of the corporation. 361 A.2d at 228-29, 235-36. As the Delaware Supreme Court held, a controversy of this type has a "substantial relationship" to Delaware (*id.*

at 236), and the State has a significant interest in seeing that the alleged wrongs to the corporation, if proven, do not go unredressed. Therefore, it is entirely possible that under the decision of the Circuit Court below these considerations would provide the minimum contacts necessary to justify the exercise of jurisdiction by the Delaware courts.

Finally, petitioners' contention that "the courts of Delaware will continue to apply the law as declared by the Delaware Supreme Court" (Pet. 10-11), ignoring the decision of the Circuit Court below, warrants some discussion. Petitioners seek, by this argument, to raise the specter of defendants rushing madly from the state courts in an attempt to find sanctuary in the federal courts, while plaintiffs are doing everything within their power to prevent removal of such actions. Respondent submits that no such forum shopping will result from the decision of the Circuit Court below.

The courts of Delaware have, in the past, indicated that they would look to the decisions of the various federal courts to resolve questions relating to the breadth of the due process clause of the fourteenth amendment to the United States Constitution, *Atlas Mut. Ben. Ass'n.* v. *Portscheller* (1945), 43 Del. 298, 46 A.2d 643; *Klein* v. *Sunbeam Corp.* (Super.Ct. 1951), 47 Del. 485, 93 A.2d 732; and that, while not actually binding, decisions of lower federal courts are "entitled to the utmost respect." *Fusco* v. *Dauphin* (Super.Ct. 1950), 45 Del. 499, 75 A.2d 701, 702. There is nothing to suggest that the Supreme Court of Delaware would depart from this practice and decline to follow the decision of the Circuit Court below on a question in-

volving the minimum requirements necessary to insure due process of law under the fourteenth amendment to the United States Constitution. Accordingly, the conflict between the decision of the Circuit Court below and the Supreme Court of Delaware, to the extent that such a conflict seems apparent, is not irreconcilable, and therefore does not require the intercession of this Court.

II. The Decision Below Does Not Conflict With the Decision in *Minichiello* v. *Rosenberg*.

Petitioners contend, in Point II of their Petition, that "the decision below is in irreconcilable conflict with the decision of the Second Circuit Court of Appeals in *Minichiello* v. *Rosenberg*, 410 F.2d 106 (2d Cir. 1968) cert. den. 396 U.S. 844 (1969)." (Pet. 12.) Respondent submits that, rather than conflicting with the decision of the Circuit Court below, *Minichiello* may easily be harmonized with that decision and, in fact, supports it.

Delaware has no "long arm statute" in the usual sense, and apparently employs the sequestration procedure here complained of for acquiring personal jurisdiction over non-resident defendants. Although Delaware characterizes the action as *quasi in rem*,*

* The Delaware sequestration procedure is classified as a *quasi in rem* action. However, the courts of Delaware, as well as the District Court below, have recognized that the procedure is designed to coerce a nonresident defendant to submit himself to the personal jurisdiction of the Delaware courts. *U. S. Industries, Inc.* v. *Gregg* (D.Del. 1972), 348 F.Supp. 1004, 1020; *Breech* v. *Hughes Tool Co.* (1963), 41 Del. Ch. 128, 189 A.2d 428; *Sands* v. *Lefcourt Realty Corp.* (1955), 35 Del.Ch. 340, 117 A.2d 365; *Loft, Inc.* v. *Guth* (1941), 25 Del.Ch. 363, 19 A.2d 721; *Weintress* v. *Bland* (Ch.Ct. 1950, 31 Del.Ch. 269, 71 A.2d 59. The title of the sequestration statute is itself a recognition of this fact: "Compelling appearance of nonresident defendant." 10 Del.C. §366.

the Circuit Court below held that, regardless of the label employed to justify the state's exercise of its judicial power — whether called *in personam*, *in rem* or *quasi in rem* — the exercise of that power to assert jurisdiction over a nonresident is subject to the constitutional limitation

> "that there be sufficient connection with the forum 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." ' 326 U.S. at 316."
> (Pet. A. 86.)

Therefore, the Circuit Court below determined that the *International Shoe* "minimum contacts" test must be applied where a state exercises such judicial power, in order to determine whether there has been compliance with these concepts of fundamental fairness.

A careful reading of the *Minichiello* decision reveals that it is based upon precisely the same consideration, *i.e.*, fundamental fairness, as is the decision of the Circuit Court below. As Judge Friendly, speaking for the panel in *Minichiello*, properly recognized, the *Seider*-type action [so named because of the decision of the New York Court of Appeals in *Seider* v. *Roth* (1966), 17 N.Y.2d 111, 269 N.Y.S. 2d 99, 216 N.E.2d 312] is "in effect a judicially created direct action statute" (410 F.2d at 109), by means of which "[t]he insurer doing business in New York is considered the real party in interest and the nonresident insured is viewed simply as a conduit, who has to be named as a defendant in order to provide a conceptual basis for getting at the insurer." *Id.* Beginning with this point, the *Minichiello* court examined this method of obtaining

jurisdiction over a nonresident defendant and concluded that, for the following reasons, it was not fundamentally unfair to require a nonresident defendant to defend an action of the *Seider* type in New York: (1) the real party defendant is an insurance company licensed to do business in, and regulated by, the State of New York (*id.*); (2) the injured plaintiff (*Seider* has been applied only to personal injury cases) is a resident of the State of New York, and therefore the State has an interest in his welfare (*id.* at 110); (3) the nonresident defendant need not go to the expense of retaining a lawyer to protect his interests, as he is entitled to have lawyers furnished in New York by the insurer, without expense to him (*id.* at 118); (4) the *Seider* means of obtaining jurisdiction over a nonresident defendant may only be employed in actions directly relating to the property which is seized, *i.e.*, it may be employed only in personal injury actions to determine whether the injured plaintiff is entitled to any part of the proceeds of a liability insurance policy procured by the allegedly negligent defendant (*id.*); (5) the nonresident defendant is entitled to defend the action in New York on the merits without fear of exposure to personal liability beyond the limits of his liability insurance policy (*id.*);* (6) and, finally, a *Seider* action will almost always be removable to federal court, thereby making available to the federal trial judge the provisions of Title 28, United States Code, Section 1404(a), to transfer the action to another forum if he finds that being required to litigate the matter in New York would result in a real hardship to the nonresident defendant. *Id.* at 119. Because of these numerous safeguards for the rights of a nonresident

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* It was suggested that this limitation, in itself, avoided the constitutional due process problems presented in *Minichiello*. 411 F.2d at 111 n.7.

defendant, the court in *Minichiello* concluded that, when judged by fourteenth amendment due process standards, the procedure was not fundamentally unfair as applied to the nonresident defendant.

In the present case, in stark contrast to the considerations found by the *Minichiello* court to provide sufficient protection to the nonresident defendant, the facts are that: (1) the defendant Gregg was not a resident of Delaware, conducted no business in that State, and owned no property physically located there — his only contact being the fictional situs of Delaware corporate stock created by Section 169, Title 8, Delaware Code (Pet. A. 72); (2) plaintiff Diversacon was a Florida corporation and had no contacts with Delaware whatsoever, while plaintiff USI had no significant contact with Delaware other than the fortuitous fact of incorporation in that State (*id.*), and the action involved no questions of Delaware law; (3) the defendant was forced to bear the expense of retaining lawyers to protect his interests in Delaware, although he had no contact with that State other than that created by the fictional situs provision; (4) the means of obtaining jurisdiction provided by the Delaware sequestration statute (10 DEL.C. §366) may be employed to obtain personal jurisdiction over a nonresident defendant even though the action bears no relationship to the property seized (*see* footnote, page 12, *supra*); (5) in order to defend the action, the defendant would be forced to submit to the personal jurisdiction of the Delaware courts, and thereby expose himself to personal liability beyond the limits of the property sequestered in Delaware (Pet. A. 91); and, (6) while this action was transferred to the federal court, it was not possible for the defendant to appear in federal court and move for a transfer pursuant to the provisions of Title 28, United

States Code, Section 1404(a), without making a general appearance and submitting himself to the personal jurisdiction of the court, thereby facing the possibility that, if the motion for transfer were denied, he would be forced to litigate the action in Delaware (Pet. A. 59).

From the foregoing comparison, it is apparent that the safeguards found sufficient in *Minichiello* to protect a nonresident defendant in a *Seider*-type action were not present in this case and that, therefore, the "traditional notions of fair play and substantial justice" inherent in the due process clause of the fourteenth amendment were lacking. This analysis also reveals that, because the court in *Minichiello* employed the same criteria (albeit without explicitly so stating in the opinion) as did the Circuit Court below to determine whether the due process clause of the fourteenth amendment had been violated, *Minichiello* supports, rather than conflicts with, the decision below.

III. The Decision Below Does Not Disregard Any Controlling Precedent of This Court.

Contrary to petitioners' assertion (Pet. 14), the decision of the Circuit Court below conforms to the controlling precedents of this Court in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, *Mullane* v. *Central Hanover Bank & Trust Co.* (1950), 339 U.S. 306, and *Hanson* v. *Denckla* (1958), 357 U.S. 235. These decisions establish that the "traditional notions of fair play and substantial justice" which are the foundation of the due process clause limit the ability of a state to exercise its judicial power to compel the personal appearance of nonresidents.

The Circuit Court below properly refused petitioners' invitation to limit the application of *International Shoe* to actions labeled *in personam*. In doing so, the Circuit Court below, applying *Mullane* and *Hanson*, rejected the argument that the requirements of the due process clause can be avoided by the use of characterizations such as *quasi in rem* and *in rem*. The Circuit Court below correctly states that such labels are of limited use and that when used to characterize actions having the purpose of acquiring personal jurisdiction over nonresidents, they must be examined in light of the "traditional notions of fair play and substantial justice" delineated in those decisions (Pet. A. 84-86).

Petitioners also take issue with the use by the Circuit Court below of the "affiliating circumstances" analysis employed by this Court in *Hanson* v. *Denckla, supra*. Petitioners would limit the application of the "affiliating circumstances" test to determinations of affinity between a state and intangible property sufficient to justify *in rem* jurisdiction, and assert that the attempt by the Circuit Court below to attribute the same constitutional content to the terms "affiliating circumstances" and "minimum contacts" is incorrect (Pet. 18). Petitioners made this argument despite this Court's statement in *Hanson*, in framing the issue before it, that:

> "The alleged defect is the absence of those 'affiliating circumstances' without which the court of a state may not enter a judgment imposing obligations on persons (jurisdiction *in personam*) or affecting interest in property (jurisdiction *in rem* or *quasi in rem*)."
>
> 357 U.S. at 245-46.

It is clear that the Circuit Court below did not misconstrue either *International Shoe* or *Hanson*, but rather, that petitioners have done so. Contrary to this Court's admonition in *Mullane* v. *Central Hanover Bank & Trust Co., supra*, that a state's characterization of the action as *in rem*, *quasi in rem* or *in personam* is not controlling (339 U.S. at 312-13), petitioners ignore the principles enunciated in those decisions and insist that Delaware's characterization of this action as *quasi in rem* is determinative of the due process question.

Petitioners erroneously assert that the Circuit Court below, by quoting with approval the concurring opinion of Judge Gibbons in *Jonnet* v. *Dollar Savings Bank of the City of New York* (3d Cir. 1976), 530 F.2d 1123, adopted such concurring opinion as its own and thereby held that *International Shoe* has overruled *Ownbey* v. *Morgan* (1921), 256 U.S. 94; *Harris* v. *Balk* (1905), 198 U.S. 215; and *Pennoyer* v. *Neff* (1877), 95 U.S. 714. Neither the decision below nor Judge Gibbons' concurring opinion in *Jonnet* contains such a statement. They simply recognize the necessity of reading the older opinions in light of the later decisions in *International Shoe* and *Mullane*.

Petitioners also place a great deal of reliance on the *Ownbey* decision. However, *Ownbey* did not deal with the constitutionality of the attachment procedure there instituted and did not involve a challenge to the state's exercise of jurisdiction over the defendant. Rather, *Ownbey* was limited to the question of whether a requirement that a defendant in an action instituted by attachment post "special bail" before he could appear and defend constituted such an arbitrary

and unreasonable requirement as to amount to a denial of due process. 256 U.S. at 103. This Court found that such a requirement did not violate the due process clause. *Ownbey* is, therefore, simply not applicable to the question involved in this case.*

The decision of the Circuit Court below does not disregard any controlling precedent of this Court, but represents an application of the principles expressed in *International Shoe*, *Mullane* and *Hanson* to the facts of this case. For this reason, the decision does not constitute a repudiation of any "trend" in favor of expansion of the scope of a state's jurisdiction over foreign corporations or other nonresidents (Pet. 18-19). The decision below merely constitutes a recognition that, whatever the "trend" might be, it is necessarily limited by the requirements of the due process clause of the fourteenth amendment.

IV. The Two Additional Constitutional Questions Raised by Respondent in the Circuit Court Below are Sufficient to Justify the Decision Reached by that Court.

In addition to the constitutional issue raised by respondent upon which the Circuit Court below reached its decision that the Delaware sequestration procedure violated the due process clause of the four-

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* Contrary to petitioners' contention, recent citations of *Ownbey* by this Court have served only as an illustration of one instance when a pre-hearing seizure of property *may* be justified. *See Calero-Toledo* v. *Pearson Yacht Leasing Co.* (1974), 416 U.S. 663; *Mitchell* v. *W. T. Grant Company* (1974), 416 U.S. 600; *Fuentes* v. *Shevin* (1972), 407 U.S. 67.

teenth amendment to the United States Constitution, respondent also asked the Circuit Court below to resolve the following two questions which are likewise of a constitutional dimension:

> "[1] Whether the Delaware procedure for seizure of Gregg's stock without a pre-seizure adversary hearing deprived him of due process and equal protection rights? . . .
>
> "[2] Whether the denial of an opportunity to make a limited appearance, defending plaintiff's claim on the merits with any judgment limited to the value of the seized property, deprived Gregg of due process?"
>
> (Pet. A. 68.)

Because of the rationale of the decision below, the Circuit Court found that "it [was] not necessary to meet Gregg's other constitutional contentions." (Pet. A. 92.) Respondent submits that, even should this Court determine that the *basis* for the decision of the Circuit Court below may not be sustained, yet the remaining two constitutional claims presented to that court by respondent are sufficient to justify the *decision and judgment* of that court.

The Delaware sequestration procedure allows seizure prior to an adversary hearing, upon an ex parte application. Assuming, without conceding, that this is one of those "extraordinary situations" which justify postponing notice and an opportunity for a hearing until after the seizure of a defendant's property has been accomplished [*see Fuentes* v. *Shevin* (1972), 407 U.S. 67, 90-91], the Delaware sequestration

procedure remains constitutionally defective because it wholly fails to provide the procedural safeguards required by the due process clause as construed in this Court's decisions in *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975), 419 U.S. 601; *Mitchell* v. *W. T. Grant Company* (1974), 416 U.S. 600; *Fuentes* v. *Shevin, supra;* and *Sniadach* v. *Family Finance Corporation* (1969), 395 U.S. 337; in the following respects: (1) the Delaware procedure allows sequestration of property which is exclusively property of the defendant and in which the plaintiff claims no right or lien; (2) it fails to require that the complaint be verified or that the supporting affidavit contain proof of the specific facts underlying the plaintiff's claim of indebtedness against the defendant; (3) in practice, it allows a writ of sequestration to issue as a matter of right, requiring nothing more than a ministerial act on the part of the judge issuing the order [so long as the procedural requirements of Chancery Rule 4(db) are satisfied, the applicant is entitled to issuance of a sequestration order as a "matter of right," *Breech* v. *Hughes Tool Co.* (1963), 41 Del.Ch. 128, 189 A.2d 428]; (4) it fails to require that the plaintiff post a bond sufficient to protect the defendant's interest in the property in the event that the sequestration is later found to have been unwarranted, and does not require a bond to cover damages and attorneys' fees should it be determined that the writ of sequestration was wrongfully issued; and (5) it apparently requires the sale of the seized property before entry of final judgment and thus deprives defendant of the opportunity to obtain appellate review before sale, thereby creating a distinct possibility that an ultimate reversal on appeal will result in nothing more than a Pyrrhic victory. *See Mitchell* v. *W. T. Grant Company, supra.* For these

reasons, the Delaware sequestration procedure is patently in conflict with the requirements of the due process clause of the fourteenth amendment to the United States Constitution delineated by this Court in the above-cited decisions, and the ultimate conclusion reached by the Circuit Court below is clearly sustainable on these grounds alone.

In addition to the constitutional claims relating to the propriety of the pre-hearing sequestration procedure provided by Delaware law, respondent submits that the decision of the Circuit Court below may also be sustained for the reason that respondent was denied due process of law when he was forced to choose between failing to appear in Delaware to defend on the merits, thereby subjecting himself to a default judgment in an amount up to the value of the property sequestered; and making a general appearance in Delaware for all purposes, thereby submitting himself to potential liability greatly in excess of the value of the property sequestered. *Cf. Minichiello* v. *Rosenberg* (2d Cir. 1968), 410 F.2d 106, *cert. denied* (1969), 396 U.S. 844; *Dry Clime Lamp Corporation* v. *Edwards* (5th Cir. 1968), 389 F.2d 590. The Circuit Court below correctly recognized the iniquitous nature of this choice when it said, referring to the sequestration procedure and the interpretation of that procedure by the Delaware courts, "the nonresident defendant is inexorably put to a Hobson's choice: either surrender by default the entire value of the seized property or submit to *in personam* jurisdiction." (Pet. A. 91.)

Fundamental concepts of fairness are not satisfied when an individual is put to a choice of the type provided by the Delaware sequestration procedure.

For this reason, the Delaware sequestration procedure violates the due process clause of the fourteenth amendment, and the ultimate conclusion reached by the Circuit Court below was correct.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

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IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-359.

U. S. INDUSTRIES, INC. and DIVERSACON INDUSTRIES, INC.,

Petitioners,

v.

F. BROWNE GREGG,

Respondent.

PETITIONERS' REPLY BRIEF.

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ARGUMENT.

Petitioners, seeing no need to deal with each of respondent's contentions, submit the following brief reply pursuant to Rule 24(4).

(1) On October 4, 1976, this Court noted its probable jurisdiction in *Shaffer, et al. v. Heitner*, No. 75-1812. This case admittedly raises the identical issues raised in *Heitner*. Principles of fundamental fairness suggests that these petitioners be afforded an opportunity to be heard when the Court considers these issues. Moreover, respondent's contention that the decision below is in but "apparent conflict" with *Heitner* (Respondent's Brief in Opposition ["Resp. Br."] p. 9) is premised upon respondent's view that *Heitner* was wrongly decided. That, of course, is one of the precise issues presented to this Court for decision.

(2) Contrary to respondent's contentions (Resp. Br. pp. 6-7), the issue presented by this case is not limited to an interpretation of a unique Delaware statute. Fundamental questions as to the extent of *all* state court jurisdiction, *in personam, in rem,* and *quasi in rem,* are necessarily raised (See Petition, pp. 11-12). Shares of stock are not the only form of intangible personalty owned by non-residents potentially attachable by state courts. There is nothing in the novel construction by the Court below of *International Shoe Co. v. Washington,* 326 U. S. 310 (1945), which warrants the conclusion that the Court was forging a rule applicable to corporate shares only. *Jonnett v. Dollar Savings Bank,* 530 F. 2d 1123, 1130 (3rd Cir. 1976), whose concurring opinion provides the rationale for the opinion below, involved a garden-variety garnishment of a mortgage debtor.

(3) At Resp. Br. 15-16, respondent unwittingly discloses the fallacy which inheres in the opinion below. Gregg states that the seizure of his shares was *per se* unconstitutional because:

> ". . . [I]t was not possible for the defendant to appear in federal court and move for a transfer pursuant to the provisions of Title 28, United States Code, Section 1404(a), without making a general appearance and submitting himself to the personal jurisdiction of the court, thereby facing the possibility that, if the motion for transfer were denied, he would be forced to litigate the action in Delaware (Pet. A. 59)."

28 U. S. C. 1404(a) is the federal *forum non conveniens* statute. It enables an action to be transferred to another district court "for the convenience of parties and witnesses, in the interests of justice" (28 U. S. C. § 1404(a)). Hence, as respondent's contention necessarily acknowledges, the Court below held that there was a *per se* violation of

"traditional notions of fair play and substantial justice" (A86) for petitioners to have sued respondent *quasi in rem* in Delaware, because such suit exposed respondent to the possibility that the trial court might have concluded, *after weighing evidence on the point,* that it *was* indeed convenient to the parties and witnesses *and* in the interests of justice that the case be tried there.

Such a holding is, we submit, so patently untenable as to mandate review and reversal by this Court.

CONCLUSION.

For these reasons as well as those expressed in the Petition, petitioners respectfully urge that review be granted.

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